In The

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-1202

STATE OF MICHIGAN,

Petitioner-Appellant,

v

HAROLD W. DORAN,

Respondent-Appellee.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

FRANK J. KELLEY
Attorney General

Robert A. Derengoski
Solicitor General

John A. Wilson
Assistant Attorney General

Jann Ryan Baugh
Assistant Attorney General

Attorneys for the Petitioner-Appellant

760 Law Building
525 West Ottawa Street
Lansing, Michigan 48913
Telephone: (517) 373-1124

Dated: February 24, 1978

PRINTED BY SPEAKER-HINES AND THOMAS, INC., LANSING, MICHIGAN—1978

TABLE OF CONTENTS

INDEX OF AUTHORITIES

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. .....

STATE OF MICHIGAN,

Petitioner-Appellant,

v

HAROLD W. DORAN,

Respondent-Appellee.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

The petitioner, the State of Michigan, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Michigan Supreme Court entered in this proceeding on November 29, 1977.

OPINIONS BELOW

The following Opinions and Orders are appended for the convenience of the court:

a. The Opinion of the Michigan Supreme Court reversing the judgment of the Bay County Circuit Court and the Michigan Court of Appeals and ordering the release of respondent-appellee. *In the matter of Doran*, 401 Mich 235; 258 NW2d 406 (1977).

b. The Order of the Michigan Supreme Court denying rehearing. *People* v *Harold W. Doran*, Michigan Supreme Court No. 58698.

STATEMENT OF JURISDICTION

The judgment of the Michigan Supreme Court was entered on October 4, 1977, *in the matter of Doran*, 401 Mich 235; 258 NW2d 406 (1977). The petitioner-appellant's Motion for Rehearing was denied by the Michigan Supreme Court on November 29, 1977. *People* v *Harold W. Doran*, Michigan Supreme Court No. 58698. This Court's jurisdiction is invoked under 28 USC 1257(3).

QUESTION PRESENTED

Did the Michigan Supreme Court misconstrue the Fourth Amendment and the Extradition clause of the United States Constitution when it held that a fugitive may challenge a demanding state's extradition documents on the basis of lack of probable cause under the Fourth Amendment, in a collateral proceeding in the asylum state's courts?

CONSTITUTIONAL PROVISIONS INVOLVED

1. United States Constitution Amendment IV. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

2. United States Constitution Article IV, §2. The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states. A person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall on demand of the executive authority of the state from which he fled, be

delivered up, to be removed to the state having jurisdiction of the crime. . . .

STATEMENT OF THE CASE

On December 18, 1975, respondent-appellee, Harold W. Doran (hereinafter respondent), was arrested in Bay City, Michigan, and charged with receiving and concealing stolen property under the laws of the State of Michigan. The charge arose out of respondent's possession of a truck which he had driven to Michigan from Arizona. The Bay City Police Department immediately notified local authorities in Maricopa County (Phoenix), Arizona. On January 7, 1976, the Arizona authorities issued a warrant for respondent's arrest charging him with the theft of a motor vehicle, or in the alternative, theft by embezzlement, pursuant to Arizona law.

On January 12, 1976, respondent was arraigned in Michigan as a fugitive. The Michigan criminal charge, Receiving and Concealing Stolen Property, was eventually dismissed. However, the time of respondent's confinement as a fugitive was extended by the Bay County Magistrate to allow additional time for his arrest to be made under a warrant of the governor of Michigan upon a requisition of Arizona's governor. On February 11, 1976, Arizona issued a requisition for extradition. The requisition was accompanied by the original complaint and warrant, plus two supporting affidavits. On March 12, 1976, a governor's warrant was issued. Respondent was arraigned thereon on March 29, 1976. Respondent's arraignment on the fugitive warrant was on January 12, 1976. Respondent twice petitioned the arraigning court for a writ of habeas corpus attacking the validity of the governor's warrant on the grounds that it was not issued in conformity with the Uniform Criminal Extradition Act. The court denied both writs. The Michigan Court of Appeals denied respondent's application for leave to appeal, the first habeas corpus

petition, and respondent's original habeas corpus petition subsequently filed in the Court of Appeals. *People* v *Harold W. Doran*, Michigan Court of Appeals Nos. 28507 and 30516. The Michigan Supreme Court granted leave to appeal on November 1, 1976. *People* v *Harold W. Doran*, 397 Mich 886. On October 4, 1977, the Michigan Supreme Court reversed the trial court's order and ordered the release of the respondent forthwith. *In the matter of Doran*, 401 Mich 235; 258 NW2d 406 (1977). On October 24, 1977, the People of the State of Michigan (hereinafter petitioner) filed an application for rehearing. On November 29, 1977, the Michigan Supreme Court denied petitioner's application for rehearing.

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW ERRONEOUSLY CONSTRUES THE FOURTH AMENDMENT AS PERMITTING THE COURTS OF AN ASYLUM STATE TO REVIEW THE DEMANDING STATE'S DOCUMENTS REQUESTING THE EXTRADITION OF A FUGITIVE AND TO DETERMINE WHETHER THE DEMANDING STATE HAS SHOWN ADEQUATE PROBABLE CAUSE TO ARREST THE FUGITIVE.

The Michigan Supreme Court has ruled that an asylum state court has the right to review extradition documents of a demanding state and determine whether or not those documents reflect probable cause to arrest the fugitive under the laws of the demanding state. A fair reading of the Michigan Supreme Court's opinion shows that its decision is based solely upon an interpretation of the fourth amendment to the United States Constitution. Petitioner submits that the Michigan Supreme Court's judgment does not rest upon independent state grounds and should be reviewed.

The interpretation which the Michigan court has given the

fourth amendment is inconsistent with the mandate of the extradition clause. Many decisions have held that, in the realm of interstate extradition, Article IV, §2, Cl 2, of the United States Constitution and the federal statute created pursuant to it, 62 Stat 822 (1948), 18 USC §3182, are supreme and override contrary state statutes. *Norton* v *State*, 93 Idaho 648; 470 P2d 413 (1970), *cert den*, 401 US 936; 91 S Ct 918; 28 L Ed 2d 215 (1971); *In re Hunt*, 276 F Supp 1122 (ED Mich, 1967), vacated and writ discharged, 408 F2d 1086 (CA 6, 1969), *cert den*, 396 US 845; 90 S Ct 81; 24 L Ed 2d 95 (1969); *Smith* v *State of Idaho*, 373 F2d 149 (CA 9, 1967), *cert den*, 388 US 919; 87 S Ct 2139; 18 L Ed 2d 1364 (1967).

Several decisions of lower federal and state courts have held that the asylum state, consistent with the extradition clause, may not look behind the demanding state's documents in order to consider federal constitutional claims raised by the fugitive. *Wise* v *State*, 197 Neb 831; 251 NW2d 373, 376 (1977) (Speedy trial); *In re Otis Golden*, 65 Cal App 3rd 789; 135 Cal Rptr 512 (1977), appeal dismissed and *cert den*, sub nom, *Golden* v *California*, ... US .....; 98 S Ct 35; 54 L Ed 2d 63 (1977) (probable cause to arrest); *Price* v *Pitchess*, 556 F2d 926, 928 (CA 9, 1977), *cert den*, 98 S Ct 504 (1977) (Double jeopardy, speedy trial). See also, *DeGenna* v *Grasso*, 413 F Supp 427, 431-432 (D Conn, 1976) affirmed, 426 US 913; 96 S Ct 2617; 49 L Ed 2d 368 (1976). Earlier decisions of this court have held that federal constitutional, and other related claims, may not be considered by an asylum state court in a collateral proceeding, but rather may only be tested in the courts of the demanding state once extradition has been effected. *Pearce* v *Texas*, 155 US 311; 15 S Ct 116; 39 L Ed 164 (1894); *Pierce* v *Creecy*, 210 US 387, 402, 404-405; 28 S Ct 714, 720; 52 L Ed 1113, 1120-1122 (1907); *Sweeney* v *Woodall*, 344 US 86, 90; 73 S Ct 139, 140-141; 97 L Ed 114, 118 (1952).

There is another compelling reason for this court's review

of the Michigan Supreme Court's judgment. The record in the proceeding below indicates that a magistrate in the demanding state, Arizona, had determined that under the laws of the State of Arizona there was reasonable cause to believe that respondent committed a crime. The Michigan Supreme Court effectively substituted its judgment on the question of probable cause for that of the Arizona magistrate. This petition does not raise the question of whether the affidavit and warrant submitted by the Arizona authorities adequately reflected probable cause to believe that the respondent committed the crime. Reasonable minds may differ on that question.

The question which petitioner respectfully requests this court to consider, is whether the Michigan Supreme Court had a *right* to address itself to the question of whether the demanding state documents adequately showed probable cause under the Fourth Amendment and the Extradition clause.

Therefore, this court should review the judgment below to clarify the obligations that a state court in an asylum jurisdiction has to review demanding state extradition documents, to determine whether those documents reflect probable cause to arrest the fugitive.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the opinion and order entered in this case by the Michigan Supreme Court.

Respectfully submitted,

FRANK J. KELLEY
Attorney General

Robert A. Derengoski
Solicitor General

John A. Wilson
Assistant Attorney General

Jann Ryan Baugh
Assistant Attorney General

Attorneys for the Petitioner-Appellant

760 Law Building
525 West Ottawa Street
Lansing, Michigan 48913
Telephone: (517) 373-1124

Dated: February 24, 1978

IN THE MATTER OF DORAN
(PEOPLE v DORAN)

Docket No. 58698. Argued June 9, 1977 (Calendar No. 18). —Decided October 4, 1977.

Harold W. Doran is detained in the Bay County jail on a governor's warrant for extradition to Arizona on alternative charges of theft of a motor vehicle or theft by embezzlement. He brought an action for *habeas corpus* in the Bay Circuit Court, John X. Theiler, J., to contest his detention, and the action was dismissed. The Court of Appeals, V. J. Brennan, P.J., and Bronson and Beasley, JJ., denied his application for leave to appeal (Docket No. 28507), and dismissed his subsequent complaint for *habeas corpus* in the Court of Appeals (Docket No. 30516). Doran appeals, asserting that he may not be extradited, because the governor's warrant for his extradition was issued more than 90 days after his arrest, and that the warrant and affidavits supporting the requisition by the Governor of Arizona are insufficient because they do not show probable cause. *Held*:

1. The Uniform Criminal Extradition Act limits the period of confinement following arrest as a fugitive to a maximum of 90 days. The purpose of this limit is to prevent unreasonably lengthy periods of confinement pending consummation of extradition proceedings by the demanding state, but the act was not intended to restrict the period within which the Governor may issue his rendition warrant. Although a fugitive may be entitled to discharge from confinement or bail after 90 days, he may nevertheless be re-arrested and extradited pursuant

REFERENCES FOR POINTS IN HEADNOTES

[1] 31 Am Jur 2d, Extradition §§ 60-63.
[2, 4, 5] 31 Am Jur 2d, Extradition § 53.
[3] 31 Am Jur 2d, Extradition §§ 36, 39.

to a valid governor's warrant issued subsequent to the 90-day period.

2. The State of Michigan may not arrest, detain, and render to the demanding state a person accused of crime unless the demanding state submits an indictment or judicial determination of probable cause, or where there has been none, adequate factual affidavits reflecting probable cause. The affidavits should be in such form as would support a finding of probable cause for the issuance of an arrest or search warrant under the Fourth Amendment decisions of the Supreme Court of the United States. The extradition statute requires that the indictment, information or affidavit made before a magistrate of the demanding state must substantially charge the person demanded with having committed a crime under the law of that state. Where there has been no indictment or judicial determination of probable cause in the demanding state, a requirement that the demanding state's affidavit set forth facts which support a determination of probable cause safeguards citizens and other persons found in the asylum state against abuse of the extradition process. The holding in this case does not apply to an indictment, but only to an affidavit.

3. In the case at bar, there is no indictment or document reflecting a prior judicial determination of probable cause. The Arizona complaint and arrest warrant are both phrased in conclusory language which simply mirrors the language of the Arizona statutes, and their supporting affidavits fail to set out facts which could justify a Fourth Amendment finding of probable cause to charge a crime. The defect has not been cured. Mr. Doran has been in custody since December 18, 1975.

The judgment of the trial court is reversed and the release of the prisoner is ordered forthwith.

1. EXTRADITION—GOVERNOR'S WARRANT—CONFINEMENT—90-DAY LIMIT—UNIFORM CRIMINAL EXTRADITION ACT.

A fugitive is entitled under the Uniform Criminal Extradition Act to be discharged from confinement or bail 90 days after his arrest as a fugitive if no valid governor's warrant has issued; he may, nevertheless, be re-arrested and extradited pursuant to a valid governor's warrant issued subsequent to the 90-day period (MCL 780.14, 780.16; MSA 28.1285[14], 28.1285[16]).

2. EXTRADITION—PROBABLE CAUSE—GOVERNOR'S REQUISITION—AFFIDAVIT.

A governor's requisition for the extradition of a fugitive must be supported by a showing of probable cause; absent a grand jury indictment or a judicial determination of probable cause, the affidavit accompanying the governor's requisition should contain more than conclusory statements and should be in a form which would support an arrest or search warrant under the Fourth Amendment decisions of the Supreme Court of the United States (US Const, Am IV).

3. EXTRADITION—GOVERNOR'S REQUISITION—AFFIDAVIT—PROBABLE CAUSE.

The Uniform Criminal Extradition Act requires that the indictment, information or affidavit made before a magistrate of the demanding state must substantially charge the person demanded with having committed a crime under the law of that state (MCL 780.3; MSA 28.1285[3]).

4. EXTRADITION—INDICTMENT—PROBABLE CAUSE.

The State of Michigan may not arrest, detain, and render to the demanding state a person accused of a crime unless the demanding state submits an indictment or judicial determination of probable cause, or where there has been none, adequate factual affidavits reflecting probable cause.

5. EXTRADITION—GOVERNOR'S REQUISITION—PROBABLE CAUSE.

An Arizona complaint and arrest warrant which are phrased in conclusory language which simply mirrors the language of the Arizona statutes, and supporting affidavits which fail to set out facts which could justify a Fourth Amendment finding of probable cause to charge a crime are not sufficient ground for extradition of a fugitive to Arizona.

Eugene C. Penzien, Prosecuting Attorney, for the people.

State Appellate Defender Office (by *Kathleen M. Cummins*) for Harold W. Doran.

BLAIR MOODY, JR., J. On December 18, 1975, defendant was arrested in Bay City, Michigan, and charged with receiving and concealing stolen property. MCLA 750.535; MSA 28.803. The charge arose out of defendant's possession of a truck in which he had driven to Michigan from Arizona.

The Bay City Police immediately notified the authorities in Maricopa County (Phoenix), Arizona. On January 7, 1976, the Arizona authorities issued a warrant for defendant's arrest charging theft of a motor vehicle or, in the alternative, theft by embezzlement. ARS 13-672(A), 13-1645, 13-661—13-663, 13-671(A); ARS 13-682, 13-688.

On January 12, 1976, defendant was arraigned in Michigan

as a fugitive. The Bay City charge was eventually dismissed. However, the time of defendant's confinement as a fugitive was extended by the Bay County magistrate to allow additional time for his arrest to be made under a warrant of the Governor of Michigan upon a requisition of Arizona's Governor.

The Uniform Criminal Extradition Act, of which both Michigan and Arizona are signatories, MCLA 780.1-MCLA 780.31; MSA 28.1285(1)—28.1285(31); ARS 13-1301—ARS 13-1328, limits the period of confinement following arrest as a fugitive to 30 days with a permissive extension period of 60 days. MCLA 780.14, 780.16; MSA 28.1285(14), 28.1285(16).

On February 11, 1976, Arizona issued a requisition for extradition. The requisition was accompanied by the original complaint and warrant, plus two supporting affidavits. On March 22, 1976, a governor's warrant was issued. Defendant was arraigned thereon on March 29, 1976, some 102 days after his arrest on the Bay County charge, but well within 90 days after the issuance of the Arizona warrant on January 7, 1976, and defendant's arraignment on the fugitive warrant on January 12, 1976.

The defendant twice petitioned the arraigning court for a writ of *habeas corpus* attacking the validity of the governor's warrant on the grounds that it was not issued in conformity with the Uniform Criminal Extradition Act. That court denied both writs. The Court of Appeals denied both defendant's application for leave to appeal the first *habeas corpus* petition and defendant's original *habeas corpus* petition subsequently filed in the Court of Appeals. This court granted leave to

appeal on November 1, 1976. 397 Mich 886 (1976).

I

Defendant initially maintains that he must be discharged because the governor's warrant issued more than 90 days after his original arrest. Defendant claims that while he was nominally arrested on December 18, 1975, on the Michigan charge of receiving and concealing stolen property, that arrest was a pretext. In actuality, defendant contends, he was held as a fugitive. Therefore, he is entitled to be discharged since more than 90 days elapsed after his original arrest before the governor's warrant issued on March 22, 1976.

We do not agree. Even if defendant is correct in his factual premise that the Michigan charge was a pretext and he was entitled to be released after 90 days, he is still subject to extradition.

There is ample authority for the proposition that although a fugitive is entitled to be discharged from confinement or bail upon expiration of the 90-day period, he or she may, nevertheless, be extradited pursuant to a valid governor's warrant issued subsequent to the expiration of the 90-day period. *People ex rel Green* v *Nenna*, 53 Misc 2d 525; 279 NYS2d 324 (1965); *aff'd* 24 AD2d 936; 264 NYS2d 211 (1965), *aff'd* 17 NY2d 817; 271 NYS2d 267; 218 NE2d 311 (1966); *Miller* v *Warden, Baltimore City Jail*, 14 Md App 377; 287 A2d 57 (1972).

In *Pepole ex rel Gummow* v *Larson*, 35 Ill 2d 280, 282; 220 NE2d 165, 167 (1966), the court reasoned thus:

> "The purpose of these sections of the extradition law is to prevent unreasonably lengthy periods of confinement

of fugitives pending consummation of extradition proceedings by the demanding State. [Citations omitted.] There is, however, no indication of any legislative intent to restrict the period within which the Governor * * * may issue his rendition warrant to the period within which the court which issues the fugitive warrant may commit the accused or require him to give bond."

Therefore, even if defendant was entitled to be released from the confinement which followed his original arrest, it is clear that he could be re-arrested on the strength of the subsequent governor's warrant.

II

Defendant next maintains that he cannot be extradited where the demanding state's warrant and affidavits supporting the requisition for the Michigan governor's warrant do not reflect an adequate showing of probable cause.

We agree. In *Kirkland* v *Preston*, 128 US App DC 148, 152, 154-155; 385 F2d 670, 674, 676-677 (1967), the United States Court of Appeals for the District of Columbia held that a governor's requisition must be supported by a showing of probable cause. Absent a grand jury indictment or a judicial determination of probable cause, the affidavit accompanying the governor's requisition should contain more than conclusory statements. The affidavit should be in such form as would support a finding of probable cause for the issuance of an arrest or search warrant under the Fourth Amendment decisions of the United States Supreme Court.

In the case at bar, there is no indictment or document reflecting a prior judicial determination of probable cause.

The Arizona complaint[1] and arrest warrant[2] are both

---

[1]

ARIZONA COMPLAINT

EXHIBIT A

East Phoenix 1 Precinct, Maricopa County, State of Arizona

STATE OF ARIZONA,
Plaintiff,
v.
HAROLD WILLIAM DORAN aka
TED FOSTER,
Defendant(s).

(FELONY

THEFT OF MOTOR VEHICLE OR IN THE ALTERNATIVE:
THEFT BY EMBEZZLEMENT

The complainant herein personally appears and, being duly sworn, complains (on information and belief) against

HAROLD WILLIAM DORAN aka TED FOSTER

charging that in EAST PHOENIX I Precinct, Maricopa County, Arizona: on or about the 18th day of DECEMBER, 1975, HAROLD WILLIAM DORAN aka TED FOSTER took from WAYNE W. KAHLER a motor vehicle described as follows, to-wit: 1973 FORD PICKUP, 1/2 TON, F100, 1975 California License Number 188MGL, VIN 10GCQ67368, with the intent to permanently deprive WAYNE W. KAHLER of such motor vehicle, all in violation of ARS, Sec. 13-672 (A) & (B), as amended 1975 and 13-1645.

OR IN THE ALTERNATIVE: THEFT BY EMBEZZLEMENT

That in EAST PHOENIX I Precinct, Maricopa County, Arizona: on or about the 18th day of DECEMBER, 1975, HAROLD WILLIAM DORAN aka TED FOSTER committed theft by embezzling from WAYNE W. KAHLER property, to-wit: One (1) 1973 FORD 1/2 TON PICKUP, F100, VIN 10GCQ67368, 1975 California License Number 188MGL, of the value of over $100.00, all in violation of ARS, Sec. 13-681, 13-682, as amended 1972, and 13-688, 13-671, 13-661, 13-662, 13-663.

(s) Richard Bishop
Complainant C/L

phrased in conclusory language which simply mirrors the language of the pertinent Arizona statutes. More importantly, the two supporting affidavits fail to set out facts which could justify a Fourth Amendment finding of probable cause for charging defendant with a crime.

The complaining police officer's initial affidavit[3] in support of the arrest warrant is factually void:

Subscribed and sworn to before me on 1-7-76.

(s) Mary Jo Dixman
Magistrate
Title, J. P.

It is requested that a (X) Warrant, ( ) summons be issued.

It is, is not requested that Defendant appear for fingerprints and photograph.

Norval Jesperson,
Deputy County Attorney

---

[2]

ARIZONA WARRANT FOR ARREST
EXHIBIT B

East Phx. No. 1 Precinct, Maricopa County,
State of Arizona

THE STATE OF ARIZONA,
Plaintiff,
vs.
HAROLD WILLIAM DORAN aka
TER FOSTER,
Defendant(s).

TO ALL PEACE OFFICERS OF THE STATE OF ARIZONA:

A complaint has been filed in this court against HAROLD WILLIAM DORAN aka TED FOSTER charging that in East No. 1 Precinct, Maricopa County, Arizona, on or about the 18th day of Dec., 1975, the crime of Felony, to-wit: THEFT OF MOTOR VEHICLE OR IN THE ALTERNATIVE: THEFT BY EMBEZZLEMENT, has been committed.

I have found reasonable cause to believe that such offense(s) were committed and that the accused committed them, and reason to believe that the accused will not appear in response to a summons, or that a warrant is otherwise appropriate.

YOU ARE THEREFORE COMMANDED to arrest the accused and bring him before this court to answer the charges. If this court is unavailable, or if the arrest is made in another county, you shall take him before the nearest or most accessible magistrate. You may release him if he posts a secured appearance bond in the amount of ..... dollars ($).

(s) Mary Jo Dixman
Justice of the Peace

(Date) Jan. 7, 1976

---

[3]

The second affidavit involved an identification of a photograph of the defendant:

EXHIBIT D

IN RE: EXTRADITION OF
HAROLD WILLIAM DORAN aka TED FOSTER

STATE OF ARIZONA
ss.
COUNTY OF MARICOPA

Thomas C. Bradley, No. 456, being duly sworn does depose and say that he is the Officer in Criminal No. 9204 versus Harold William Doran aka Ted Foster; that he has been shown a photograph dated 12/18/75, marked Exhibit "D" by reference attached and made a part hereof; that the person photographed is the same person who was charged with the crime of Theft of Motor Vehicle, OR IN THE ALTERNATIVE: Theft by Embezzlement, a felony, within the jurisdiction of EAST PHOENIX I Justice Court Precinct, County of Maricopa, as charged in the above-numbered cause.

FURTHER deponeth sayeth not.

Dated this 3rd day of February, 1976.

(s) Thomas C. Bradley
Thomas C. Bradley No. 456

Subscribed and sworn to by Thomas C. Bradley, before Beverly R. Parisi, a Notary Public, this 3rd day of February, 1976.

(s) Beverly R. Parisi
Notary Public
My Commission Expires:
March 11, 1977

[Photo attached].

"EXHIBIT C

"County of Maricopa, State of Arizona

"The undersigned hereby declares:

"That he is currently employed as a peace officer for the City of Phoenix Police Department, Phoenix, Arizona.

"That, pursuant, to his employment he has been assigned to investigate allegations that HAROLD WILLIAM DORAN aka TED FOSTER did violate Section(s) § 13-672(A)(B) and 13-1645.

"That, pursuant to said assignment, your declarant:

"1. Has contacted persons having knowledge of said offense and has prepared written reports and statements; and

"2. Has received and read written reports and statements prepared by others, known by your declarant to be law enforcement officers;

"All of which are included in the report consisting of 9 pages, which is presently an official record of this Department.

"That each of these documents is presently an official record of a law enforcement agency.

"WHEREFORE, your declarant prays that a warrant issue for the herein-above-named defendant, that he be dealt with according to law.

"I declare under penalty of perjury that the foregoing is true and correct.

"Executed on this 3rd day of February, 1976, in Maricopa County.

"(s) Thomas C. Bradley
Declarant
Thomas Bradley No. 456
"City of Phoenix Police Dept.,
Phx., Az.
Address of Law Enforcement
Agency

"Subscribed and sworn to me this 3rd day of February, 1976.

"(s) Beverly R. Parisi
Notary Public
My Commission Expires:
March 11, 1977"

Kirkland v *Preston*, *supra*, discussed at length the requirements for Federal rendition. The Federal statute requires "an indictment found or an affidavit made before a magistrate • • •, charging the person demanded with having committed treason, felony, or other crime". 18 USC 3182.

The Michigan statute, based on the Uniform Criminal Extradition Act, *supra*, provides for the furnishing of "certified copies of the indictment returned, or information and affidavit filed, or of the complaint made to the judge or magistrate, and the warrant issued thereupon, stating the offense with which the accused is charged". Significantly the statute further provides that the "indictment, information, or affidavit made before the magistrate must *substantially charge* the person demanded with having committed a crime under the law of that state". MCLA 780.3; MSA 28.1285(3). (Emphasis added.)

The police officer's affidavit in *Kirkland* read, in its pertinent part, as follows:

> "• • • [O]n the 23rd day of July A.D., 1965, in the County and District aforesaid [Dade County] one Oliver Lee Kirkland & Elizabeth Maria Smith DID THEN AND THERE: unlawfully, wilfully, maliciously and feloniously set fire to and burn or cause to be burned a certain building, to wit: The Hut Bar, located at 2280 S. W. 32nd Avenue, City of Miami, Dade County, Florida, a further and more particular description of said bar being to the affiant unknown, the said bar being the property of one Fredrich Ritter." *Kirkland, supra,* 150; 385 F2d 672.

The *Kirkland* court found the warrant factually deficient and stated its holding thus:

> "We hold that, for purposes of extradition, the section 3182 'affidavit' does not succeed in 'charging' a crime unless it sets out facts which justify a Fourth Amendment finding of probable cause."

The *Kirkland* result is also consistent with the Uniform Act's requirement that the indictment, information or affidavit "substantially charge" the person demanded with having committed a crime under the laws of the demanding state.

Judge J. Skelly Wright speaking for the court in *Kirkland* eloquently set forth at length its rationale for refusing extradition on the basis of an insufficient affidavit:

> "There is no reason why the Fourth Amendment, which governs arrests, should not govern extradition arrests. Under its familiar doctrine arrests must be preceded by a finding of probable cause. When an extradition demand

> is accompanied by an indictment, that document embodies a grand jury's judgment that constitutional probable cause exists. But when the extradition papers rely on a mere affidavit, even where supported by a warrant of arrest, there is no assurance of probable cause unless it is spelled out in the affidavit itself. Thus Fourth Amendment considerations require that before a person can be extradited on a Section 3182 affidavit the authorities in the asylum state must be satisfied that the affidavit shows probable cause.
>
> • • •
>
> "The law appreciates the hardship which extradition can involve: not only the suspension of one's liberty, but his deportation from the state in which he lives into another jurisdiction which may be hundreds of miles from his home. The law accordingly surrounds the accused with considerable procedural protection to stave off wrongful rendition. It is consistent with this concern for the accused's just treatment to recognize his right to require official confirmation of probable cause in the asylum state before extradition. This right to probable cause confirmation seems especially appropriate in view of the fact that the accused will have no access to an evidentiary preliminary hearing on probable cause until he finally arrives in the accusing jurisdiction.
>
> "In addition, the interests of the asylum state are advanced by its own probable cause determination. For it would be highhanded to compel that jurisdiction to lend its coercive authority, and the processes of its law, against even its own citizens in aid of an enterprise the key details of which remain in the dark. If, as here, it turns out that the prosecution against the fugitive is unfounded, the asylum state will have expended its resources and given

the legitimizing stamp of its judiciary to a cause which is at best futile, at worst arbitrary.

"Recognizing a probable cause requirement in Section 3182, moreover, conflicts with no compelling interests elsewhere in the legal system. If the demanding state does have probable cause data, it will be no real inconvenience to record this evidence in the extradition papers. Documenting probable cause in an affidavit is what the policeman in many jurisdictions, including the District of Columbia, must do if he is to secure an ordinary warrant for an arrest or search. And governors, or *habeas corpus* judges, will hardly be significantly burdened by having to study written submissions for probable cause in extradition cases.

"From all these considerations the court draws the conclusion that the terms of 18 USC 3182 are not met unless the affidavit indicates to the asylum state executive that there is probable cause for believing the accused guilty and that *habeas corpus* is the appropriate remedy to test the validity of his judgment. Since the Florida Section 3182 affidavit was insufficient and this defect was not cured in the time provided by the court, release of the prisoners was mandatory." (Footnotes omitted.) *Kirkland, supra,* 154-155; 385 F2d 676-677.

The *Kirkland* v *Preston* view that the Fourth Amendment applies to extradition warrants has been adopted by the United States Courts of Appeals for the First and Third Circuits. See *Ierardi* v *Gunter,* 528 F2d 929, 930-931 (CA 1, 1976) (where the court concluded that *Gerstein* v *Pugh,* 420 US 103; 95 S Ct 854; 43 L Ed 2d 54 [1975], "requires a judicial determination of probable cause as a prerequisite to interstate extradition".); and *United States ex rel Grano* v *Anderson,* 446 F2d 272 (CA 3, 1971).

The *Kirkland* holding has also been adopted by the Supreme Courts of Colorado and Nevada, a New York intermediate appellate court and a Connecticut trial court, See *United States ex rel Mayberry* v *Yeager,* 321 F Supp 199, 211 (D NJ, 1971); *Pippin* v *Leach,* 188 Colo 385; 534 P2d 1193 (1975) (refusing to extradite to Michigan because the affidavit, "replete with conclusions and bald allegations of criminal conduct without supporting facts", failed to "set forth some of the underlying circumstances surrounding the crime charged, as well as an adequate identification of the source or sources of the information set forth in the affidavit".); *Sheriff* v *Thompson,* 85 Nev 211; 452 P2d 911 (1969); *People ex rel Cooper* v *Lombard,* 45 AD2d 928; 357 NYS2d 323 (New York Supreme Court, Appellate Division, Fourth Department, 1974) ("the asylum State has a vital interest in the liberty of its citizens and other inhabitants, and since it is only a slight burden on a demanding State to show probable cause for the issuance of a warrant of arrest • • • we join the Second Department in adopting the holding of *Kirkland* v *Preston.*"); *Brode* v *Power,* 31 Conn Sup 411; 332 A2d 376 (1974).[4]

---

[4]

The Supreme Courts of Illinois, Indiana and South Dakota have rejected the *Kirkland* v *Preston* view on the ground that the asylum state should not inquire into the regularity of the papers issued by the demanding state. It appears that there are other cases going both ways and, no doubt, there are other rationales.

See People ex rel Kubala v *Woods,* 52 Ill 2d 48; 284 NE2d 286, 290 (1972) (extraditing to Michigan on a conclusory affidavit; there were factual affidavits but they were made before a notary public

In *Williams* v *Wayne County Sheriff*, 395 Mich 204, 238; 235 NW2d 552 (1975), we adverted to but did not decide the instant question. An equally divided Court affirmed the denial of a petition for writ of *habeas corpus* sought by a Michigan resident resisting extradition. Three Justices of this Court stated that the courts of this state will not look behind the face of an *indictment*. Three Justices stated that *Kirkland* v *Preston* "held that a requisition affidavit cannot constitutionally support a rendition arrest unless that affidavit sets out facts which justify a Fourth Amendment finding of probable cause" and would have allowed plaintiff to introduce proofs tending to show that the indictment was a forgery.

The court in *Kirkland* v *Preston*, distinguishing between an indictment and an affidavit, indicated that its holding would not extend to an indictment. Our holding in the instant case does not apply to an indictment. Like the court in *Kirkland*, our holding only applies to an *affidavit*.

In this state, although the statute provides that an arrest warrant shall issue "[i]f it appears from such examination" that an offense has in fact been committed, the practice has not been to conduct an examination to establish probable cause. *People* v *Burrill*, 391 Mich 124, 129; 214 NW2d 823 (1974). MCLA 766.3; MSA 28.921. Here, however, in all felony and some misdemeanor cases the accused is entitled to a prompt preliminary examination. It is not clear whether

---

and not a magistrate and, therefore, said the court, "will not support the issuance of the rendition warrant"; the court recognized that "it is highly desirable that the affidavit charging a crime in an extradition proceeding recite sufficient facts to show probable cause"); *Bailey* v *State*, 260 Ind 448, 452; 296 NE2d 422, 425 (1973); *Wellington* v *State*, ... SD ....; 238 NW2d 499, 503 (1976).

there was an independent judicial determination of probable cause made by the Arizona magistrate before issuance of the governor's requisition.

However, the question presented by this case is broader than whether the Federal or state statutes provide for a showing of probable cause. The Fourth Amendment permits an arrest only on probable cause. Here there has been no showing of probable cause, only conclusory statements in an affidavit. In the light of the Michigan practice of issuing arrest warrants without requiring a showing of probable cause, there is no reason to assume that the Arizona affidavit was made upon a showing, not of record, of probable cause.

While the invalidity of an arrest warrant does not affect the jurisdiction of a court to try the charge for which the offender was arrested, evidence seized incident to an arrest pursuant to an invalid arrest warrant will be suppressed unless the arresting officer himself had factual information consituting probable cause for arrest. *People* v *Burrill*, *supra*, 132-136. Here, the Michigan authorities have insufficient factual information constituting probable cause to detain or render the defendant on the Arizona charge.

To be sure, "[t]he guilt or innocence of the accused as to the crime of which he is charged may not be inquired into by the governor or in any proceeding after the demand for extradition". MCLA 780.19; MSA 28.1285(19). However, this statute must be construed consistently with the Fourth Amendment preclusion of arrest and detention without probable cause. It is not suggested that the Michigan courts inquire into the underlying facts. It is determined rather that Michigan may not arrest, detain and render to the demanding state

a person accused of a crime unless that state submits an indictment or a judicial determination of probable cause or adequate factual affidavit(s) reflecting probable cause.

Where there has been no indictment or judicial determination of probable cause in the demanding state, a requirement that the demanding state's affidavit set forth facts which support a determination of probable cause safeguards citizens and other persons found in the asylum state against abuse of the extradition process.

The Arizona warrant and supporting affidavit(s) are obviously insufficient and this defect has not been cured. The trial court is reversed and the release of the prisoner (defendant) is ordered forthwith.[5]

---

[5]

In *Ierardi, supra*, the First Circuit granted *habeas corpus* relief and dismissed the prisoner from the custody of the governor's warrant. The federal proceedings were instituted after the prisoner had failed to obtain relief from the Supreme Judicial Court of Massachusetts. The First Circuit went further than the District of Columbia Circuit by requiring a judicial determination of probable cause.

In *Grano supra*, the Third Circuit proceedings also were instituted after the prisoner had exhausted his state remedies. The district court allowed the demanding state to submit supplemental affidavits and on that basis found probable cause. The Third Circuit affirmed that finding, one judge dissenting on the ground that the governor of the demanding state should reconsider his requisition on the supplemented record before the asylum state acts on his otherwise deficient demand.

In *Kirkland* v *Preston, supra*, the District of Columbia Circuit released the prisoners after the Florida authorities failed to cure the defective affidavit.

The defendant in this case has been in custody since December 18, 1975; we believe it appropriate that he be released.

KAVANAGH, C.J., and WILLIAMS, LEVIN, COLEMAN, FITZGERALD, and RYAN, JJ., concurred with BLAIR MOODY, JR., J.

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the City of Lansing, on the 29th day of November in the year of our Lord one thousand nine hundred and seventy-seven.

Present the Honorable
THOMAS GILES KAVANAGH,
Chief Justice,
G. MENNEN WILLIAMS,
CHARLES L. LEVIN,
MARY S. COLEMAN,
JOHN W. FITZGERALD,
JAMES L. RYAN,
BLAIR MOODY, JR.,
Associate Justices

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v 58698 HAROLD WILLIAM DORAN, Defendant-Appellant.	CoA: 28507 LC: 76-207

In this cause an application for rehearing is considered and is hereby DENIED.

STATE OF MICHIGAN—ss.

I, Harold Hoag, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 29th day of November in the year of our Lord one thousand nine hundred and seventy-seven.

[SEAL]

Calvin R. Davis, Deputy Clerk.
Corbin

APPENDIX

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-1202

STATE OF MICHIGAN,

Petitioner,

—v.—

HAROLD W. DORAN

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF MICHIGAN

PETITION FOR CERTIORARI FILED FEBRUARY 27, 1978
CERTIORARI GRANTED APRIL 17, 1978

PRINTED BY SPEAKER-HINES AND THOMAS., INC., LANSING, MICHIGAN—1978

Page

TABLE OF CONTENTS

IN THE MATTER OF:
HAROLD WILLIAM DORAN,

VS.

STATE OF ARIZONA & GOVERNOR OF THE STATE OF MICHIGAN & PROSECUTING ATTORNEY OF BAY COUNTY & BAY COUNTY SHERIFF,

WILLIAM CAPRATHE,

Public Defender

March 12, 1976	Verified Complaint for Declaratory Judgment
March 12, 1976	Affidavit of William Caprathe
March 17, 1976	Proof of Service
March 17, 1976	Proof of Service
March 17, 1976	Order to Show Cause for Temporary Inj. & Ex-Parte Restraining Order
March 17, 1976	Affidavit of Financial Condition
March 17, 1976	Affidavit for Suspension of Fees
March 17, 1976	Order suspending fees
March 17, 1976	Notice of Hearing
March 17, 1976	Praecipe (3-22-76) 9:30 A.M.
March 19, 1976	Proof of Service
March 23, 1976	Writ of Habeas Corpus
March 23, 1976	Praecipe (3-29-76) 9:30 A.M.
March 26, 1976	Petition for Writ of Habeas Corpus & Commitment
March 26, 1976	Praecipe (3-29-76)

April 13, 1976	Order to Quash
April 19, 1976	Order for Contempt
April 28, 1976	Appointment of Attorney
April 28, 1976	Application for leave to appeal
April 28, 1976	Brief in support
April 28, 1976	Brief in support
April 28, 1976	Motion for Bond
April 28, 1976	Motion for Stay of Proceedings
April 28, 1976	Motion for immediate consideration
April 28, 1976	Affidavit in support of motions
April 28, 1976	Motion for petition asking Superintending Control
April 28, 1976	Arguments
April 22, 1976	Praecipe (5-3-76)
April 22, 1976	Praecipe (5-3-76)
April 30, 1976	Complaint for Writ of Habeas Corpus
April 30, 1976	Proof of service
May 7, 1976	Petition for appointment of attorney
May 7, 1976	Affidavit
May 7, 1976	Appointment of attorney
May 10, 1976	Transcript (Arraignment)
May 10, 1976	Transcript (Hearing February 2 & 5)
July 29, 1976	Amended Complaint for Writ Habeas Corpus
August 18, 1976	Order denying Writ of Habeas Corpus

August 18, 1976	Proof of Service
August 25, 1976	Appointment of Attorney
August 26, 1976	Notice of Hearing
August 26, 1976	Motion for Bond
August 26, 1976	Praecipe (8-30-76)
August 27, 1976	Stenographer's Certificate
August 30, 1976	Letter
August 30, 1976	Proof of Service
August 30, 1976	Notice of Filing Claim of Appeal
August 30, 1976	Claim of Appeal
August 30, 1976	Affidavit of Appointment of Counsel
August 30, 1976	(Copy) Appointment of Attorney
Sept. 1, 1976	Letter
Sept. 9, 1976	Reporters notice of filing transcript
Sept. 9, 1976	Transcript (Hearing)
Sept. 9, 1976	Praecipe (9-13-76) 8:30
Sept. 10, 1976	Motion to transfer Def. to Hosp. or Conv. Facility
Sept. 28, 1976	Notice of Hearing
Sept. 28, 1976	Motion for extension of Stay Ext.
Sept. 28, 1976	Proof of Service
Sept. 28, 1976	Praecipe (10-4-76)
October 4, 1976	Transcript (Motion)
October 14, 1976	Motion to set bond & transfer def. to hosp.
October 14, 1976	Notice of hearing
October 14, 1976	Praecipe (10-18-76) 8:30

Nov. 23, 1976	Order from Court of Appeals
Dec. 2, 1976	Praecipe (12-6-76)
Dec. 2, 1976	Notice of Hearing
Dec. 2, 1976	Motion to set Bond & motion to transfer def. to Hospital, etc.
Dec. 9, 1976	Order
January 24, 1977	Order from Supreme Court
April 28, 1977	Praecipe (5-2-77)
February 3, 1977	Praecipe (2-7-77)
February 3, 1977	Notice of Hearing
February 3, 1977	Motion to set bond & Transfer Def. to Hosp.
April 29, 1977	Notice of Hearing
April 29, 1977	Motion to set bond, etc.
May 12, 1977	Order
May 26, 1977	Order from Supreme Court Order
May 26, 1977	Praecipe (5-31-77)
May 26, 1977	Motion to set bond, transfer def. to Hosp., etc.
May 26, 1977	Notice of Hearing
May 26, 1977	Memo in support of motion for Bond on Appeal
June 9, 1977	Praecipe (6-13-77) 1:30
June 16, 1977	Order
June 21, 1977	Defendant's Exhibit #1
July 28, 1977	Praecipe (8-1-77)

July 28, 1977	Notice of Hearing
July 28, 1977	Motion to set bond
August 4, 1977	Order
August 11, 1977	Transcript (Motion 6-1-77)
Sept. 15, 1977	Sealed proceedings (Motion 6-1-77)
Oct. 6, 1977	Order from Court of Appeals

COUNTY OF BAY
STATE OF MICHIGAN } ss.

IN THE MATTER OF:

HAROLD WILLIAM DORAN

VS.

THE PEOPLE OF THE STATE OF MICHIGAN

I, Steven Toth, Clerk of said County of Bay and Clerk of the Circuit Court for said County, do hereby certify that I have compared the foregoing copy of DOCKET ENTRIES FILE # 76-207 with the original record thereof, now remaining in my office, and that it is a true and correct transcript therefrom, and of the whole of such original record.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court and County, this 8th day of May A.D. 1978.

[SEAL]

STEVEN TOTH, Clerk
By Dorothea Wiechec, Deputy

STATE OF MICHIGAN
COURT OF APPEALS

IN THE MATTER OF EXTRADITION: PEOPLE OF THE STATE OF MICHIGAN Plaintiff-Appellees vs HAROLD WILLIAM DORAN Defendant-Appellant	No. 28507 L. Ct. No. 76-207-T

DOCKET ENTRIES

April 28, 1976	Application for Emergency Leave to Appeal filed
April 28, 1976	Motion for stay of proceedings—lower court
April 28, 1976	Motion for bond pending appeal
April 28, 1976	Motion for Immediate Con[illegible]ion application for emerg. lv. to [illegible]peal
May 4, 1976	Order granting Immed. Consid.; den[illegible] application for emerg. lv. to app[illegible] deny stay of proceedings; deny bo[illegible]

In the Court of Appeals
Clerk's Office

STATE OF MICHIGAN,—ss.

I, Ronald L. Dzierbicki, Clerk of the Court of Appeals of the State of Michigan, do hereby certify that the annexed and foregoing is a true and correct copy of Docket Entries in People v Harold William Doran—CA# 28507 in said court in said cause: that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court of Appeals, at Lansing, this 9th day of May A.D. 1978.

Ronald L. Dzierbicki /s/
Clerk

STATE OF MICHIGAN
COURT OF APPEALS

HAROLD WILLIAM DORAN, a/k/a TED FOSTER, Plaintiff vs SHERIFF OF BAY COUNTY, Defendant	No. 30516 L. Ct. No. 76 207 T

DOCKET ENTRIES

August 30, 1976	Stenographer's Certificate filed
September 9, 1976	Notice of filing transcript
September 9, 1976	Complaint for Habeas Corpus Filed
October 28, 1976	Motion for stay of extradition
October 28, 1976	Motion for bond pending appeal
November 18, 1976	Order denying Order to Show Cause; dismissing complaint, denying motion for bond pending appeal and motion for stay of extradition

In the Court of Appeals
STATE OF MICHIGAN,—ss. **Clerk's Office**

I, Ronald L. Dzierbicki, Clerk of the Court of Appeals of the State of Michigan, do hereby certify that the annexed and foregoing is a true and correct copy of Docket Entries in Harold William Doran, a/k/a Foster v Bay County Sheriff CA# 30516 in said court in said cause: that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court of Appeals, at Lansing, this 9th day of May A.D. 1978.

Ronald L. Dzierbicki /s/
Clerk

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v 58698

HAROLD WILLIAM DORAN,
Defendant-Appellant
(Counsel Deleted)

APPEAL FROM COURT OF APPEALS #28507
County of Bay—Theiler

DATE	PROCEEDINGS
1976	
July 28	Delayed Application filed.
July 28	Motion for Immediate Consideration filed.
July 28	Motion for Stay filed.
July 28	Motion for Bond filed.
July 30	Court of Appeals, Circuit Court records filed.
Aug 9	Answers to Delayed Application, Motion for Stay, Motion for Immediate Consideration and Motion for Bond filed.
Nov 1	Immediate Consideration GRANTED, Application GRANTED, Bond and Stay DENIED.
1977	
Apr 11	Motion for Bond filed.
May 2	Motion to Advance Cause or for Bond, or for Peremptory Relief filed.
May 25	Immediate Consideration GRANTED, Motion for Bond REMANDED to Bay with instructions.
May 26	Motion for Leave to File Typewritten Brief filed.
May 27	Motion for Oral Argument filed.
June 6	Motions to type and replace later and for oral argument GRANTED.
June 9	Argued and Submitted.
June 28	Motion for Bond on Appeal filed.

June 28	Motion for Immediate Consideration filed.
Oct 4	REVERSED and Defendant ordered RELEASED forthwith.
Oct 4	Circuit Court and Court of Appeals records returned with remittitur.
Oct 6	Motion for Bond DENIED AS MOOT.
Oct 24	Application for Rehearing (typed) filed by Attorney General.
Nov 2	Objections to Application for Rehearing filed.
Nov 29	Application for Rehearing DENIED.
1978	
Apr 21	Copy of Order of United States Supreme Court GRANTING CERTIORARI filed.

STATE OF MICHIGAN—ss.

I, Harold Hoag, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of the docket entries in this cause; that I have compared the same with the original and that this is a true transcript and whole thereof.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 9th day of May in the year of our Lord one Thousand nine hundred and seventy-eight.

Corbin R. Davis /s/
Deputy Clerk

[SEAL]

HAROLD WILLIAM DORAN,
a/k/a Ted Foster, Plaintiff-Appellant,

v 59193

BAY COUNTY SHERIFF,

Defendant-Appellee

(Counsel Deleted)

APPEAL FROM COURT OF APPEALS #30516
COUNTY BAY—Theiler

DATE	PROCEEDINGS
1976	
Dec 13	Application filed.
Dec 13	Motion for Immediate Consideration filed.
Dec 13	Motion for Consolidation filed.
1977	
Jan 19	Application and motions for immediate consideration and consolidation DENIED, extradition STAYED pending People v Doran #58698.

STATE OF MICHIGAN—ss.

I, Harold Hoag, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of the docket entries in this cause; that I have compared the same with the original and that this is a true transcript and whole thereof.

IN TESTIMONY WHEREOF, I have hereunto set may hand and affixed the seal of said Supreme Court at Lansing, this 11th day of May in the year of our Lord one thousand nine hundred and seventy-eight.

Corbin R. Davis /s/
Deputy Clerk

ACTION IN 74TH DISTRICT COURT DATED DECEMBER 18, 1975

STATE OF MICHIGAN
74TH DISTRICT COURT

ACTION IN COURT
AND NOTICE OF HEARING

Defendant—Doran, Harold Wm.; Govt. Unit—STAT 12/18/75; Case No. 5-4687 H; Address—Unknown; D.O.B.—6/2/24; Officer—Jablonski - BCPD; Date in Court—12/18/75; Recording No.—75/H/; Offense Charged —Rec. & Conc. 0/$100.

(X) Arraignment; (Plea)—Mute; Bond—$2,000.00 C/S.

Notes: Exp. Ops.—G—S.S.; Own Atty.

You Must Appear: 2:30 p.m. Dec. 29, 1975 for:
(X) Prelim. Exam.

So Ordered: (s) Arthur E. Higgs, District Judge

ACTION IN 74TH DISTRICT COURT DATED DECEMBER 26, 1975

STATE OF MICHIGAN

74TH DISTRICT COURT

ACTION IN COURT

AND NOTICE OF HEARING

Defendant—Doran, Harold Wm.; Govt. Unit—STAT 12/18/75; Case No.—5-4687 H; D.O.B.—6/2/24; Officer—Jablonski - BCPD; Date in Court—12/26/75; Recording No. 75/H/273B.688; Offense Charged—Rec. & Conc. over $100.00; re: Attorney.

Notes: Defendant retaining C. M. Gorte; Waives 12 days; Prelim adjourned to

You Must Appear: 2:30 p.m. January 23, 1976 for:
(X) Prelim. Exam.

So Ordered: (s) Arthur E. Higgs, District Judge

TRANSCRIPT OF ARRAIGNMENT IN 74TH DISTRICT COURT

74TH DISTRICT COURT
STATE OF MICHIGAN

PEOPLE OF THE STATE OF MICHIGAN VS. HAROLD WILLIAM DORAN	ARRAIGNMENT (Filed May 10, 1976)

January 12, 1976
County Bldg.
Bay City, Michigan

Before—ARTHUR E. HIGGS, District Judge.

Recorded by—LORAINE JARCZYNSKI,
Official Court Recorder.

THE COURT: Mr. Doran your being charged that you were charged in Maricopa County, Aricona on a warrant issued by the Honorable Tim Weeks, Judge of the First Precinct Justice Court on January the 7th, 1976 with having on December 11, 1975 committed the offense of Felony Theft of a Motor Vehicle that based on the issuance of said warrant, affiant has probable cause to believe that the above-named person is guilty of said offense so charged against him in that he is a fugitive from justice, and has fled from said State of Arizona, and that the above-named person is now found in this State at the Bay County Jail and is liable under the Constitution and Laws of the United States and of this State to be delivered over upon demand of the governor of the State of Arizona to be removed to said State from whence he fled justice.

You have a right to have a hearing on this particular complaint sir. You also have a right to have an attorney represent you on this . . . . .

MR. DORAN: I also have a right to have bond on that too your Honor.

THE COURT: Yes, ah hum.

MR. DORAN: I saw Gorte Friday.

THE COURT: Okay.

MR. DORAN: I'm suppose to get in touch with him, but I haven't heard from him yet.

THE COURT: Allright. Where abouts do you live sir?

MR. DORAN: Well my people all live in town. I can . . . .

THE COURT: No, but where do you live?

MR. DORAN: I don't I haven't been living in this State.

THE COURT: Well where do you stay?

MR. DORAN: Box 710 Arbor Street my father lives.

THE COURT: 710?

MR. DORAN: Ah hum.

THE COURT: You don't have a permanent address anyplace.

MR. DORAN: Well there if I want to use it.

THE COURT: I see—is there a telephone there?

MR. DORAN: Ah hum.

THE COURT: What's the telephone number?

MR. DORAN: I don't know the number it's under William.

THE COURT: How old are you?

MR. DORAN: Fifty-one.

THE COURT: Are you married or single?

MR. DORAN: Single.

THE COURT: Do you own any real estate sir?

MR. DORAN: No real estate.

THE COURT: Okay, any car or anything of that nature?

MR. DORAN: Three of 'em.

THE COURT: Three cars?

MR. DORAN: Ah hum.

THE COURT: Okay. What kind are they?

MR. DORAN: Morris Miner, it's a collector's item. A Tempest Pontiac and . . . . . .

THE COURT: What year is the Tempest Pontiac?

MR. DORAN: Sixty-one.

THE COURT: Is that a collector's item too?

MR. DORAN: No, just a good running car.

THE COURT: And what about the third one?

MR. DORAN: Ford Mustang, 67.

THE COURT: Okay, Mr. Gorte is going to represent you in this is he?

MR. DORAN: I'm sure he is.

THE COURT: Allright: I'm going to check you out sir. Your bond at the present moment is ten thousand dollars, and ah your hearing date, today's the 12th of January ah . . . .

MR. DORAN: I'm entitled to call witnesses on this extradition, am I not?

THE COURT: Yes sir, yes you are. Will be set ah for the 5th day of February and that will be at nine o'clock in the morning.

If the papers come through sir, then that would be moved up then.

MR. DORAN: How come they bring this in after a seventy-two hour date.

THE COURT: Pardon. On the ah, on the extradition sir, there's a certain amount of lag time and ah the Statute said, it's up to thirty days hearing date, so all the paper work can be done.

RECORDER'S CERTIFICATE

I, Loraine Jarczynski, Official Court Recorder in and for the 74th District Court of Michigan, do hereby certify that the foregoing is a true and accurate transcription of the electronic recording made at the time of the above Arraignment, and is all of the same.

Loraine Jarczynski /s/
Official Court Recorder
74th District Court
State of Michigan

74th District Court Mittimus

STATE OF MICHIGAN — THE DISTRICT COURT
74th JUDICIAL DISTRICT

County of Bay

County Building, Center & Madison

Bay City, Michigan

People of the State of Michigan, vs. Harold Wm. Doran, Defendant	Case No. 6-4023-7

Before Arthur E. Higgs, District Judge of the above named Court on 1/12/1975.

To the Sheriff of Bay County:

Whereas, the above said Defendant was on 1/12/, 1975, regularly brought before me, a District Judge charged with having committed the offense of fugitive from justice.

A violation of ( ) as more fully appears by the record and files.

And said Defendant having demanded examination, and

Whereas, I, the said District Judge, thereupon required the said Defendant to enter in a recognizance, with sufficient sureties in the sum of $10,000.00 C/S, for his appearance at:

1. CIRCUIT COURT ( )

2. DISTRICT COURT for examination (X)

3. DISTRICT COURT for trial ( )

4. DISTRICT COURT for sentence ( )

to be held on February 5, 1976, 1976, at 9:00, 2nd floor, to answer to said charge, and said Defendant having not offered sufficient bail; THEREFORE, In the Name of the People of the State of Michigan, you the said Sheriff, are hereby commanded forthwith to take the said Defendant and convey and deliver said Defendant to the City/County Jail.

And you are hereby required in the Name of the People of the State of Michigan, to receive the said Defendant into your custody in said Jail, and there safely keep until discharged by law.

Given under my Hand, and the seal on 1/12/, 1975.

ARTHUR E. HIGGS /s/
District Judge

[SEAL]

ACTION IN 74TH DISTRICT COURT DATED FEBRUARY 5, 1976

STATE OF MICHIGAN
74TH DISTRICT COURT

ACTION IN COURT
AND NOTICE OF HEARING

Defendant—Doran, Harold Wm., Govt. Unit—STAT 12/18/75; Case No.—5-4687 H; D.O.B.—6/2/24; Officer—Jablonski - BCPD; Date in Court—2/5/76; Recording No.—76/H/; Offense Charged—Rec. & Conc. over $100.00.

Bond—$2,000.00 C/S.

Notes: G. Mullison, B. Caprathe.

You Must Appear: 9:30 a.m. Feb. 13, 1976 for:
(X) Prelim. Exam.

So Ordered: (s) Arthur E. Higgs, District Judge

ORDER OF NOLLE PROSEQUI IN DISTRICT COURT

REQUEST FOR DISMISSAL
Case Nos. 5-4687H

NOW COME THE PEOPLE OF THE STATE OF MICHIGAN and hereby request that the (complaint and warrant) issued in the above matter charging the Defendant with "Receiving and Concealing over $100"

be dismissed for the following reason(s): the Defendant is being extradited to Arizona on a charge of theft of a motor vehicle and the matters can be taken care of there.

(s) George B. Mullison
(Asst.) Prosecuting Attorney

Dated: February 5, 1976.

ORDER

At a session of said Court held in the Courthouse in the City of Bay City, County of Bay, Michigan on the 9th day of February, 1976.

PRESENT: HONORABLE ARTHUR E. HIGGS,
DISTRICT JUDGE.

UPON READING AND FILING THE ABOVE REQUEST FOR DISMISSAL, IT IS HEREBY ORDERED that the same be and it hereby is dismissed.

(s) Arthur E. Higgs
District Judge

cc: Public Defender's Office

ARIZONA COMPLAINT

IN THE JUSTICE COURT DR #75-120589 PPD

EAST PHOENIX I PRECINCT, MARICOPA COUNTY

STATE OF ARIZONA

STATE OF ARIZONA, Plaintiff v. HAROLD WILLIAM DORAN aka TED FOSTER Defendant(s).	"EXHIBIT A" No. 9204 COMPLAINT (FELONY)

THEFT OF MOTOR VEHICLE OR IN THE ALTERNATIVE: THEFT BY EMBEZZLEMENT

The complainant herein personally appears and, being duly sworn, complains (on information and belief) against HAROLD WILLIAM DORAN aka TED FOSTER charging that in EAST PHOENIX I Precinct, Maricopa County, Arizona: on or about the 18th day of DECEMBER, 1975, HAROLD WILLIAM DORAN aka TED FOSTER took from WAYNE W. KAHLER a motor vehicle described as follows, to-wit: 1973 FORD PICKUP, ½ TON, F100, 1975 California License Number 188MGL, VIN 10GCQ67368, with the intent to permanently deprive WAYNE W. KAHLER of such motor vehicle, all in violation of A.R.S., Sec. 13-672(A) & (B), as amended 1975 and 13-1645.

OR IN THE ALTERNATIVE: THEFT BY EMBEZZLEMENT

That in EAST PHOENIX I Precinct, Maricopa County, Arizona: on or about the 18th day of DECEMBER, 1975, HAROLD WILLIAM DORAN aka TED FOSTER committed theft by embezzling from WAYNE W. KAHLER property, to-wit: One (1) 1973 FORD ½ TON PICKUP, F100 VIN 10GCQ67368, 1975 California License Number 188MGL, of the value of over $100.00, all in violation of A.R.S., Sec. 13-681, 13-682, as amended 1972, and 13-688, 13-671, 13-661, 13-662, 13-663.

Richard Bishop /s/ Complainant C/L, Agency or Title PPD
Subscribed and sworn to before me on 1-7-76.
Mary Jo Dixman /s/ J.P.
Magistrate Acting Title

It is requested that a (X) warrant, ( ) summons be issued.

It is, is not requested that Defendant appear for fingerprints and photograph.

Norval Jesperson
Deputy County Attorney

ARIZONA WARRANT

IN THE JUSTICE COURT
EAST PHOENIX No. I PRECINCT, MARICOPA COUNTY, STATE OF ARIZONA

THE STATE OF ARIZONA vs. HAROLD WILLIAM DORAN aka TED FOSTER Defendant(s)	No 9204 WARRANT FOR ARREST Exhibit B

TO ALL PEACE OFFICERS OF THE STATE OF ARIZONA: A complaint has been filed in this court against HAROLD WILLIAM DORAN aka TED FOSTER charging that in East No. I Precinct, Maricopa County, Arizona, on or about the 18th day of Dec. 1975, the crime of Felony, to-wit: THEFT OF MOTOR VEHICLE OR IN THE ALTERNATIVE: THEFT BY EMBEZZLEMENT has been committed.

I have found reasonable cause to believe that such offense(s) were committed and that the accused committed them, and reason to believe that the accused will not appear in response to a summons, or that a warrant is otherwise appropriate.

YOU ARE THEREFORE COMMANDED to arrest the accused and bring him before this court to answer the charges. If this court is unavailable, or if the arrest is made in another county, you shall take him before the nearest or most accessible magistrate. You may release him if he posts a secured appearance bond in the amount of .....dollars ($ .....). Jan. 7, 1976.

Mary Jo Dixman /s/
Justice of the Peace

DECLARATION IN SUPPORT OF ARREST WARRANT

COUNTY OF MARICOPA, STATE OF ARIZONA
DECLARATION IN SUPPORT OF ARREST WARRANT

"EXHIBIT C"

The undersigned hereby declares:

That he is currently employed as a peace officer for the City of Phoenix Police Department, Phoenix, Arizona.

That, pursuant to his employment he has been assigned to investigate allegations that HAROLD WILLIAM DORAN aka TED FOSTER did violate Section(s) §13-672(A)(B) and 13-1645.

That, pursuant to said assignment, your declarant:

1. Has contacted persons having knowledge of said offense and has prepared written reports and statements; and

2. Has received and read written reports and statements prepared by others, known by your declarant to be law enforcement officers.

All of which are included in the report consisting of 9 pages, which is presently an official record of this Department.

That each of these documents is presently an official record of a law enforcement agency.

WHEREFORE, your declarant prays that a warrant issue for the herein-above-named defendant, that he be dealt with according to law.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 3rd day of February, 1976, in Maricopa County.

THOMAS BRADLEY /s/
DECLARANT
Thomas Bradley # 456

City of Phoenix Police Dept., Phx., Az.
Address of Law Enforcement Agency
Subscribed and sworn to me this 3rd day of February, 1976.

BEVERLY R. PARISI /s/
Notary Public
My Commission Expires:
March 11, 1977

AFFIDAVIT OF THOMAS C. BRADLEY

STATE OF ARIZONA }
COUNTY OF MARICOPA } ss.

AFFIDAVIT
IN RE: EXTRADITION OF HAROLD WILLIAM DORAN
aka TED FOSTER

(Filed in the Justice Court, Maricopa County, State of Arizona)

"EXHIBIT D"

Thomas C. Bradley #456, being duly sworn does depose and say that he is the Officer in Criminal No. 9204 versus Harold William Doran aka Ted Foster; that he has been shown a photograph dated 12/18/75, marked Exhibit "D" by reference attached and made a part hereof; that the person photographed is the same person who was charged with the crime of Theft of Motor Vehicle OR IN THE ALTERNATIVE: Theft by Embezzlement, a felony within the jurisdiction of EAST PHOENIX I Justice Court Precinct, County of Maricopa, as charged in the above-numbered cause.

FURTHER deponeth sayeth not.
Dated this 3rd day of February, 1976.

THOMAS C. BRADLEY /s/
Thomas C. Bradley #456

Subscribed and sworn to by Thomas C. Bradley, before Beverly R. Parisi, a Notary Public, this 3rd day of February, 1976.

BEVERLY R. PARISI /s/
NOTARY PUBLIC

MY COMMISSION EXPIRES:
March 11, 1977

(Photograph deleted)

MICHIGAN COMPLAINT

STATE OF MICHIGAN
IN THE DISTRICT COURT FOR THE
74TH JUDICIAL DISTRICT

IN THE MATTER OF: HAROLD WILLIAM DORAN	COMPLAINT

STATE OF MICHIGAN }
COUNTY OF BAY } -ss-

Eugene C. Penzien, Bay County Prosecuting Attorney, complains and says that he is informed and believes that the above-named person is charged in Maricopa County, Arizona on a warrant issued by the Honorable Tim Weeks, Judge of the First Precinct Justice Court on January 7, 1976 with having on December 18, 1975 committed the offense of Felony Theft of a Motor Vehicle; that based on the issuance of said warrant, affiant has probable cause to believe that the above-named person is guilty of said offense so charged against him in that he is a fugitive from justice, and has fled from said State of Arizona, and that the above-named person is now found in this State at the Bay County Jail and is liable under the Constitution and Laws of the United States and of this State to be delivered over upon demand of the governor of the State of Arizona to be removed to said State from whence he fled justice;

THEREFORE, COMPLAINANT PRAYS that the above-named person may be apprehended and held to answer this

complaint, and further dealt with in relation to the same as law and justice may require.

EUGENE C. PENZIEN /s/
EUGENE C. PENZIEN
Bay County Prosecuting Attorney

Taken, subscribed and sworn to before me at the City of Bay City in said County, this 12th day of January, 1976.

ARTHUR E. HIGGS /s/
District Judge

MICHIGAN WARRANT

STATE OF MICHIGAN
IN THE DISTRICT COURT FOR THE
74TH JUDICIAL DISTRICT

IN THE MATTER OF: HAROLD WILLIAM DORAN	**WARRANT**

STATE OF MICHIGAN }
COUNTY OF BAY } -ss-

TO THE SHERIFF, THE DEPUTY SHERIFF, COURT OFFICER, STATE POLICE OFFICER, OR POLICE OFFICER:

WHEREAS Eugene C. Penzien, Bay County Prosecuting Attorney, has this date made and filed a complaint in the District Court for the 74th Judicial District that one Harold William Doran is charged in the State of Arizona upon a warrant issued by the Honorable Tim Weeks, Judge of the First Precinct Justice Court with the offense of Felony Theft of a Motor Vehicle

AND, WHEREAS said complainant has probable and just cause to believe, and does believe, that the said Harold William Doran is guilty of said offense so charged against him, and that he is a fugitive from justice, and has fled from said State of Arizona and that the said Harold William Doran is now found within this State, to-wit: at the Bay County Jail in said County, and is liable under the Constitution and Laws of the United States and of this State to be delivered over upon the demand of the governor of the State of Arizona to be removed to said State, from whence he fled from justice.

AND, WHEREAS, on examination, on oath, of the said Eugene C. Penzien by me it appears to me that said offense has been committed and that there is just cause to believe the said Harold William Doran to have been guilty thereof, and that the said Harold William Doran fled from the said State of Arizona after the commission of said offense, and is a fugitive from justice, and is now found within this State, to-wit: at the Bay County Jail in said County, and is liable under the Constitution and Laws of the United States and of this State to be delivered over upon demand of the governor of the said state from whence he fled from justice, and therefore:

IN THE NAME OF THE PEOPLE OF THE STATE OF MICHIGAN, you and each of you are commanded forthwith to arrest the said Harold William Doran and bring him before me to be dealt with according to law.

Arthur E. Higgs /s/
District Judge

Dated: Jan. 12, 1976

ARIZONA REQUISITIONS

STATE OF ARIZONA

REQUISITION

EXECUTIVE DEPARTMENT

The Governor of the State of Arizona to his Excellency the Governor of the State of Michigan.

Whereas, It appears from the annexed application of the Maricopa County Attorney, State of Arizona, for requisition for the extradition of one HAROLD WILLIAM DORAN aka TED FOSTER, together with supporting papers which I certify to be authentic and duly authenticated according to the laws of this State, that HAROLD WILLIAM DORAN aka TED FOSTER stands charged with the crime of Theft of Motor Vehicle, or in the alternative, Theft by Embezzlement a felony under the laws of this State, committed in the county of MARICOPA this State; and it having been represented and satisfactorily shown to me that the accused was present in this State at the time of the commission of said crime and thereafter fled from the justice of this State and has taken refuge and is now to be found in the State of MICHIGAN.

Now, Therefore, Pursuant to the provisions of the CONSTITUTION AND LAWS OF THE UNITED STATES, and existing treaty relations, in such cases made and provided, I do hereby request that the said HAROLD WILLIAM DORAN aka TED FOSTER be apprehended and delivered to PAUL BLUBAUM, Maricopa County Sheriff, or his authorized deputy as agent, who is hereby authorized to receive and convey the

said HAROLD WILLIAM DORAN aka TED FOSTER to the State of Arizona, here to be dealt with according to law.

In Witness Whereof, I have hereunto set my hand and caused the Great Seal of the State of Arizona to be affixed.

Done at Phoenix, the Capitol, this 11th day of February, in the year of our Lord, One Thousand Nine Hundred and Seventy-six and of the Independence of the United States of America, the two-hundredth.

Raul H. Castro /s/
Governor of the State of Arizona

By the Governor
Wesley Bolin /s/
Secretary of State

STATE OF ARIZONA

Executive Department

The Governor of the State of Arizona, to all to whom these Presents shall come, sends Greetings.

Know Ye, That I, Raul H. Castro, Governor of the State of Arizona, have authorized and empowered, and by these presents do authorize and empower PAUL BLUBAUM, Maricopa County Sheriff, or his authorized agent to receive from the proper authorities of THE STATE OF MICHIGAN HAROLD WILLIAM DORAN aka Ted Foster an alleged fugitive from justice, and to convey him to this State, to be dealt with according to law.

All persons are therefore requested to permit the said agent, at his own proper cost, to remove the said HAROLD WILLIAM DORAN aka Ted Foster and to transport him, unmolested, into this State, the said agent peaceably and lawfully behaving. The State is not to be liable for any expense incurred in the pursuit, arrest and return of said fugitive except as may be hereafter approved by executive authority.

In Witness Whereof, I have hereunto set my hand and caused the Great Seal of the State of Arizona to be affixed.

Done at Phoenix, the Capitol, this 11th day of February, in the year of our Lord, One Thousand Nine Hundred and Seventy-six and of the Independence of the United States of America, two-hundredth.

Raul H. Castro /s/
Governor of the State of Arizona

By the Governor:
Wesley Bolin /s/
Secretary of State

EXEMPLIFICATION

STATE OF ARIZONA }
County of Maricopa, } ss.

I hereby certify that the foregoing Complaint, marked "Exhibit A", and the foregoing Warrant of Arrest, marked "Exhibit B", are true copies of said Complaint and Warrant of Arrest, with the endorsements thereon, in the case of the State of Arizona vs HAROLD WILLIAM DORAN aka TED

FOSTER, Defendant, pending in the Justice Court of EAST PHOENIX I Precinct, County of Maricopa, State of Arizona.

Given under my hand this 4th day of FEBRUARY 1976.

Tim Weeks /s/
Justice of the Peace
East Phoenix #1 Precinct

STATE OF ARIZONA }
County of Maricopa, } ss.

I, WILSON D. PALMER Clerk of the Superior Court of Maricopa County, State of Arizona, (which is a Court of Record, in and for the said County having a seal) do hereby certify: That TIM WEEKS whose name is subscribed to the certificate of the annexed instrument, and thereon written was, at the time of the execution of said certificates, and now is the duly elected, qualified and acting Justice of the Peace of EAST PHOENIX #I Precinct, in the County of Maricopa, State of Arizona.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the Seal of the said Superior Court of Maricopa County, State of Arizona, this 4th day of FEBRUARY, 1976.

Wilson D. Palmer /s/
Clerk of the Superior Court of
Maricopa County, State of Arizona.

STATE OF ARIZONA }
County of Maricopa, } ss.

I, ROBERT C. BROOMFIELD Judge of the Superior Court of Maricopa County, State of Arizona, do hereby certify that

WILSON D. PALMER is Clerk of the Superior Court of Maricopa County, State of Arizona (which court is a Court of Record, having a seal;) that the signature to the foregoing certificate and attestation is the genuine signature of the said WILSON D. PALMER as such officer; that the seal annexed thereto is the seal of said Superior Court; that said WILSON D. PALMER, as such clerk, is the proper officer to execute the said certificate and attestation, and that such attestation is in due form according to the laws of the State of Arizona.

IN WITNESS WHEREOF, I have hereunto set my hand in my official character as such Judge at the City of Phoenix, County and State aforesaid, this 6 day of February, A.D. 1976.

Robert C. Broomfield /s/
Judge of the Superior Court of
Maricopa County, State of Arizona.

STATE OF ARIZONA)
County of Maricopa, } ss.

I, WILSON D. PALMER, Clerk of the Superior Court of Maricopa County, State of Arizona (which Court is a Court of Record, having a seal, which is annexed hereto,) do hereby certify that ROBERT C. BROOMFIELD whose name is subscribed to the foregoing certificate of due attestation was, at the time of signing the same, Judge of the Superior Court aforesaid, and was duly commissioned, qualified and authorized by law to execute said certificate. And I do further certify that the signature of the Judge above named to the said certificate of due attestation is genuine.

IN WITNESS WHEREOF, I have hereunto set my hand and annexed the Seal

of the Superior Court, at my office, in said County, this 6th day of FEBRUARY 1976

Wilson D. Palmer /s/
Clerk of the Superior Court of
Maricopa County, State of Arizona.

TO HIS EXCELLENCY, RAUL CASTRO
Governor of the State of Arizona,

SIR:

Your petitioner, DEAN M. WOLCOTT, Supervisor, Complaint and Extradition Division, County Attorney of Maricopa County, State of Arizona, respectfully represents that one HAROLD WILLIAM DORAN aka TED FOSTER stands charged in due form by complaint under oath, duly filed in the Justice Court of EAST PHOENIX I Precinct, County of Maricopa, State of Arizona, and a warrant duly issued in accordance with the prayer of said complaint, a copy of which said complaint and supporting affidavit and a copy of said warrant being hereunto duly attached, marked "Exhibit A", and "Exhibit B", a copy of Warrant Affidavit marked "Exhibit C", a copy of Picture Affidavit marked "Exhibit D", respectively and made a part of this petition, as though fully set forth herein, with the crime of THEFT OF MOTOR VEHICLE - OR IN THE ALTERNATIVE - THEFT BY EMBEZZLEMENT the same being under the laws of this State a felony, committed as follows, to-wit:

That in EAST PHOENIX I Precinct, Maricopa County, Arizona on or about the 18th day of DECEMBER, 1975, HAROLD WILLIAM DORAN aka TED FOSTER took from WAYNE W. KAHLER a motor vehicle described as follows,

to-wit: 1973 FORD PICK-UP, ½ TON, F100, 1975 California License Number 188MGL, VIN 10GCQ67368, with the intent to permanently deprive WAYNE W. KAHLER of such motor vehicle, all in violation of A.R.S., §13-672(A)(B), as amended 1975 and §13-1645. OR IN THE ALTERNATIVE: THEFT BY EMBEZZLEMENT

That in EAST PHOENIX I Precinct, Maricopa County, Arizona, on or about the 18th day of DECEMBER, 1975, HAROLD WILLIAM DORAN aka TED FOSTER committed theft by embezzling from WAYNE W. KAHLER property, to-wit: One (1) 1973 Ford ½ TON PICK-UP, F100, VIN 10GCQ67368, 1975 California License Number 188MGL, of the value of over $100.00, all in violation of A.R.S., §13-688, 13-671, 13-661, 13-662 and 13-663.

All of which is a felony under the laws of Arizona and is contrary to the form, force, and effect of the statute in such cases made and provided and against the peace and dignity of the State of Arizona;

That the said HAROLD WILLIAM DORAN aka TED FOSTER was personally present in Maricopa County, Arizona, at the time aforesaid, and after the commission of the said crime, the said HAROLD WILLIAM DORAN aka TED FOSTER fled from the justice of the State of Arizona, and is now in the custody of the Sheriff's Office, Bay City, Michigan.

That, in the opinion of your petitioner, the ends of justice require that the said HAROLD WILLIAM DORAN aka TED FOSTER be brought to the State of Arizona for trial, at the public expense; that your petitioner believes that he has sufficient evidence to secure the conviction of the said fugitive HAROLD WILLIAM DORAN aka TED FOSTER upon the charge alleged in said complaint hereinbefore referred to.

That the person named as agent is one PAUL BLUBAUM, Sheriff of Maricopa County, State of Arizona, or by his authorized agent, who is a proper person and who has no private interest in the arrest of the fugitive.

That the application is not made for the purpose of enforcing the collection of a debt, or for any private purpose whatever, and that if the requisition applied for be granted, the criminal proceedings shall not be used for any of said objects.

WHEREFORE, your petitioner prays that a requisition may be issued upon the Governor of the State of MICHIGAN for the rendition and return of the said HAROLD WILLIAM DORAN aka TED FOSTER and that PAUL BLUBAUM, Sheriff of Maricopa County, State of Arizona or by his authorized agent as aforesaid, be appointed agent of the State of Arizona to apprehend, receive and return said fugitive to the County of Maricopa, State of Arizona, for trial.

DEAN M. WOLCOTT /s/
Dean M. Wolcott, Supervisor
County Attorney of Maricopa County,
State of Arizona
Complaint and Extradition Division

STATE OF ARIZONA }
County of Maricopa } ss.

DEAN M. WOLCOTT, being first duly sworn, upon his oath deposes and says:

That he is the duly appointed Supervisor, Complaint and Extradition Division, qualified and acting County Attorney of Maricopa County, State of Arizona; that he has read the foregoing petition and knows the contents thereof, and that the

same is true, except as to those matters and things therein stated upon information and belief, and as to such he believes them to be true.

DEAN M. WOLCOTT /s/
Dean M. Wolcott

Subscribed and sworn to before me this 2nd day of February, 1976.

BEVERLY R. PARISI /s/
Notary Public in and for the County of Maricopa, State of Arizona.

My Commission Expires:
March 11, 1977

DORAN, Harold William aka
FOSTER, Ted

STATE OF ARIZONA
Office of the Attorney General

Phoenix, Arizona
February 11, 1976

I have carefully examined the above and foregoing application for a requisition and the accompanying papers thereto attached.

It is my opinion, based upon such examination, that the application is in due form and complies with all of the requirements of law and the rules of interstate rendition of fugitives from justice, and that it would be proper for you, as Governor, to grant the application.

I, therefore, approve the papers and advise the issuance of the requisition therein requested.

BRUCE E. BABBITT
The Attorney General

By (Signature deleted)
Assistant Attorney General

RAUL H. CASTRO
Governor

OFFICE OF THE GOVERNOR
STATE HOUSE
PHOENIX, ARIZONA 85007

February 11, 1976

The Honorable Wesley Bolin
Secretary of State
State Capitol
Phoenix, Arizona

Re: State of Arizona vs. Harold William Doran aka Ted Foster

Dear Mr. Bolin:

The Secretary of State of Arizona is respectfully requested to authenticate papers authorizing Paul Blubaum, Maricopa County Sheriff or his his authorized deputy, as agent of the State of Arizona, to receive into custody from the authorities of the State of Michigan the above-named alleged fugitive who stands charged with the crime of Theft of Motor Vehicle, or in the alternative, Theft by Embezzlement, a felony.

The necessary instruments accompany this requisition.

Sincerely,

Raul H. Castro

MICHIGAN GOVERNOR'S WARRANT

STATE OF MICHIGAN
EXECUTIVE DEPARTMENT

WILLIAM G. MILLIKEN
GOVERNOR

To the Sheriff of the County of BAY, State of Michigan, and any other officer in this State authorized by the uniform extradition act of Michigan to execute this warrant:

Whereas, requisition has been made upon me by the Governor of the State of ARIZONA for the arrest and extradition of HAROLD WILLIAM DORAN AKA TED FOSTER wherein it has been represented to me that said HAROLD WILLIAM DORAN/TED FOSTER stands charged with the crime of THEFT OF MOTOR VEHICLE, OR IN THE ALTERNATIVE, THEFT BY EMBEZZLEMENT alleged to have been committed in the County of MARICOPA, in or about on the 18TH day of DECEMBER, A.D. 1975, being a crime under the laws of said State, and that said HAROLD WILLIAM DORAN aka TED FOSTER is a fugitive from the justice of said State; having fled therefrom and taken refuge in the State of Michigan as appears by a certified copy of APPLICATION, COMPLAINT, WARRANT & SUPPORTING PAPERS and other documents duly certified to be authentic and duly authenticated; according to the constitution and laws of the United States and of this State;

Therefore you are hereby required forthwith to arrest and secure the said HAROLD WILLIAM DORAN aka TED FOSTER wherever HE may be found within this State and to take HIM forthwith before any judge of a court of record in this State in whose jurisdiction HE may be; for further proceedings in accordance with the uniform extradition act of this

State; and after compliance therewith; unless discharged by law; to deliver HIM to PAUL BLUBAUM, SHERIFF, OR HIS AUTHORIZED agent appointed by the Governor of the State of ARIZONA to receive HIM. You will make return of this warrant within thirty days to the Governor of Michigan; and of the proceedings thereunder; and of the time and manner of the service thereof.

In Testimony Whereof, I have hereunto set my hand, and caused the Great Seal of the State to be affixed at Lansing, this 22ND day of MARCH in the year of our Lord one thousand nine hundred and SEVENTY-SIX.

[SEAL]

WILLIAM G. MILLIKEN /s/
Governor

By the Governor:
RICHARD H. AUSTIN /s/
Secretary of State

MICHIGAN GOVERNOR'S WARRANT

STATE OF MICHIGAN
EXECUTIVE DEPARTMENT

WILLIAM G. MILLIKEN
GOVERNOR

To PAUL BLUBAUM, SHERIFF OR HIS AUTHORIZED AGENT, Agent of the State of ARIZONA.

Whereas, requisition has been made upon me by the Governor of the State of ARIZONA for the arrest and extradition of HAROLD WILLIAM DORAN aka TED FOSTER from which it appears that said HAROLD WILLIAM DORAN aka TED FOSTER stands charged with the crime of THEFT OF MO-

TOR VEHICLE, OR IN THE ALTERNATIVE, THEFT BY EMBEZZLEMENT alleged to have been committed in the County of MARICOPA IN OR ABOUT on the 18TH day of DECEMBER A.D. 1975, being a crime under the laws of said State; and that said HAROLD WILLIAM DORAN AKA TED FOSTER is a fugitive from the justice of said State; having fled therefrom and taken refuge in the State of Michigan; and

It further appearing to me that said application is authentic and duly authenticated in accordance with the constitution and laws of the United States and of this State, and that you have been appointed by the Governor of said State as the agent of said State to receive the said HAROLD WILLIAM DORAN aka TED FOSTER and remove HIM to said State;

Therefore, in the name of the People of the State of Michigan you are hereby authorized and empowered to receive and take the said HAROLD WILLIAM DORAN aka TED FOSTER from the proper authorities of the State of Michigan; after compliance has been made with the uniform extradition act of this State, and to remove HIM to the State of ARIZONA at your own expense to answer to the charge made as aforesaid:

In Testimony Whereof, I have hereunto set my hand, and caused the Great Seal of the State to be affixed at Lansing, this 22ND day of MARCH in the year of our Lord one thousand nine hundred and SEVENTY-SIX.

[SEAL]

William G. Milliken /s/
Governor

By the Governor:
Richard H. Austin /s/
Secretary of State

PETITION FOR WRIT OF HABEAS CORPUS

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF BAY

IN THE MATTER OF THE PETITION OF HAROLD WILLIAM DORAN FOR WRIT OF HABEAS CORPUS.	File No. 76-207-T

PETITION FOR WRIT OR HABEAS CORPUS

Now comes HAROLD WILLIAM DORAN, Petitioner herein, by and through his attorney, WILLIAM J. CAPRATHE, of the Bay County Public Defender's Office, and for his complaint for the issuance of a writ of habeas corpus says as follows:

1. That the Petitioner in whose behalf the writ is applied for is restrained of his liberty pursuant to commitment on failure to furnish bond issued by Honorable Arthur E. Higgs, District Court Judge, on February 9, 1976, copy attached.

2. That this commitment indicated that it was an extension of time for authorities in Arizona to submit an Arizona Governor's warrant.

3. It further states that the first commitment on failure to furnish bond dated January 12, 1976, was based upon the sworn complaint in writing of the Bay County Prosecuting Attorney on January 12, 1976.

4. That the complaint referred to in said commitment cited no statutes for authority, nor did a warrant signed by Judge

Higgs on January 12, 1976, nor the January 12 commitment on failure to furnish bond, nor did the February 9, 1976 commitment.

5. That the Prosecuting Attorney, Eugene C. Penzien, told the attorney for the defendant, William J. Caprathe, orally that the first commitment was pursuant to 780.14 and the February 9 commitment was pursuant to 780.16, both of MCLA.

6. That since the commitments were based upon a complaint and warrant that did not state statutory authority, they are invalid on their face and the commitment orders are invalid and Mr. Doran is being illegally held.

7. In addition, 780.14 requires an examination before the Judge or Magistrate before the original 30 day commitment order.

8. That no examination was afforded Mr. Doran (at least not in the presence of his counsel, who was appointed on January 24, 1976, at 11:15 a.m. That this is further evidenced by mittimus sheets dated January 12, 1976, January 21, 1976, and February 5, 1976, all signed by Judge Higgs and all including a circle around the words "demanded examination". See copies attached).

9. That since no examination was provided Mr. Doran, this confinement order is also invalid because it did not comply with the examination requirement, and Mr. Doran is being illegally held.

10. That there has been nothing served on the Defendant or, his counsel, or in the District Court file, to establish Arizona's intention or the presence of a valid warrant in Arizona.

11. That on December 18, 1975, the day of his arrest, Mr. Doran indicates that a representative of the F.B.I. appeared at the Bay County Jail and questioned him as to his being willing to waive extradition to Arizona and he was also questioned on that date by Detective Ronald Monville of Bay City Police Department who stated that Michigan would drop the receiving and concealing charges if Mr. Doran would waive extradition. On the same day, Mr. Doran was asked by Deputy Mono if he would be willing to waive extradition.

12. That on March 16, 1976, Petitioner had been detained in the Bay County Jail for a period of over 90 days without receiving a requisition of the executive authority of the state having jurisdiction of the offense nor anything in writing from them.

13. That Mr. Doran's commitment is invalid and illegal, because more than the 90 days allotted for commitment to await requisition, provided for in 780.14 and 780.16, have elapsed since Mr. Doran's arrest on December 18, 1975.

14. That a Verified Complaint for Declaratory Judgment and an Order to Show Cause for Temporary Injunction and Ex parte Restraining Order was filed for Harold Doran by this counsel and set for hearing on March 22, 1976.

15. That because of failure to personally serve the Prosecuting Attorney of Bay County, the hearing was adjourned until March 29, 1976.

16. That this hearing for Writ of Habeas Corpus should take precedence over the proceedings referred to in Paragraph 15 herein.

17. That the place of the restraint referred to herein is the Bay County Jail in the County of Bay, State of Michigan.

18. That this petition is based upon the Code of Criminal Procedures, supplemental chapter, Michigan Compiled Laws 780, Uniform Criminal Extradition Act.

19. That for the reasons stated herein the restraint of Harold Doran is illegal and he should be dismissed from custody and the Complaint and Warrant in the District Court dismissed.

Date: March 25, 1976.

(s) William J. Caprathe
Attorney for Defendant

(s) Harold W. Doran
Defendant

Subscribed and sworn to before me this 25 day of March, 1976.

(s) William J. Caprathe
Notary Public, Bay County, Michigan
My commission expires: Aug. 6, 1978
Oakland acting in Bay

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF BAY

STATE OF MICHIGAN
COUNTY OF BAY
(Attestation deleted)

THE PEOPLE OF THE STATE OF MICHIGAN Plaintiff vs. HAROLD WILLIAM DORAN Defendant	FILE NO. 76-207-T

ORDER FOR COMMITMENT

At a session of said Court held in the Courthouse in the City of Bay City, County of Bay, State of Michigan on the 14 day of April, 1976.

PRESENT: HONORABLE JOHN X. THEILER, CIRCUIT JUDGE.

On March 29, 1976, the above-named person was arraign by this Court on a warrant issued by the Governor of the State of Michigan calling for the extradition of said person to the State of Arizona. He has indicated that he wishes to apply for a Writ of Habeas Corpus and he has been granted until April 23, 1976 to file an application for a writ of habeas corpus.

NOW, THEREFORE, IT IS ORDERED that the defendant be committed to the custody of the Bay County Sheriff.

IT IS FURTHER ORDERED that no bail bond is set at this time.

John X. Theiler /s/
JOHN X. THEILER, Circuit Judge

APPLICATION FOR LEAVE TO APPEAL TO THE MICHIGAN COURT OF APPEALS

(Filed April 28, 1976)

TO THE HONORABLE COURT OF APPEALS:

HAROLD WILLIAM DORAN, Appellant herein, through his attorney WILLIAM J. CAPRATHE, of the Bay County Public Defender's Office, respectfully shows to the Court that he is lodged in the Bay County Jail in the City of Bay City, in the County of Bay, State of Michigan, and that the Honorable John Theiler of the Bay County Circuit Court on March 29, 1976, erroneously dismissed defendant's writ of Habeas Corpus and refused to take evidence and rule upon a verified complaint for declaratory judgment and order to show cause for temporary injunction.

Appellant further shows that on December 18, 1975, the defendant herein was arrested for possession of a stolen vehicle in Michigan and possible auto theft in Arizona.

Appellant further shows that file no. 6-4023H in the District Court for the 74th Judicial District, State of Michigan, exhibit no. 1 of the above titled writ of habeas corpus contains a complaint dated January 12, 1976, and signed by Eugene C. Penzien, Bay County Prosecuting Attorney and Arthur E. Higgs, District Judge for the District Court of the 74th Judicial District, State of Michigan, and a warrant signed by Judge Higgs. The said complaint and warrant alleges that there is an outstanding warrant in Arizona and Harold William Doran should be arrested and dealt with according to law. Since appellant was already in custody, there was no need for further arrest.

Appellant further shows that the District Court file contains a document also dated January 12, 1976, entitled "Commitment on Failure to Furnish Bond," wherein the Honorable District Judge Arthur Higgs stated, "and whereas upon the examination of said above named person this day before me in regard to said offense, it appears to me that there is reasonable cause to believe the said offense was committed and that the said above-named person to be guilty thereof, and that he is duly charged therewith in the State of Arizona and has fled from said state to this state, and is liable to be delivered over upon demand of the Governor of said State from whence he fled justice; — ." Said commitment also set a $10,000 bond and ordered the defendant's appearance on February 15, 1976. Also, contained in said file is a mittimus dated January 12, 1976, stating, "fugitive from justice" and indicating "examination demanded" and setting the same for January 23, 1976, at 3:30 p.m., but was crossed out and replaced with February 5, 1976 at 9:00 a.m. and signed by the Honorable Arthur E. Higgs. Appellant further shows that another mittimus was signed by the Honorable Arthur Higgs on January 21, 1976, indicating that there were two charges, "receiving and concealing over $100 and fugitive from justice." Also, "demanded examination." There were two numbers on this mittimus, 5-4687H and 6-4023H, the bonds were $10,000 and $2,000. The examination date was set to be held on January 23, 1976, at 2:30 p.m. and February 5, 1976 at 9:00 a.m.

Appellant further shows that on January 21, 1976, the Public Defender's Office, more particularly, William J. Caprathe was appointed to represent Mr. Doran on both files 5-4687H and 6-4023H. Appellant further shows that examination was requested with regards to both cases by Mr. Doran who was not represented by counsel until our appointment on January 21, 1976 and by counsel on his behalf thereafter which is evidenced by the mittimuses in said file. Appellant further shows that the

preliminary examination scheduled for January 23, 1976 for the receiving and concealing charge, 5-4687H was adjourned without Motion or any mention on the record or any notice to the defendant or his attorney who was appointed on January 21, 1976. Appellant further shows that the first mention of the adjournment was in response to defense counsel's allegations on page twenty of the transcript of February 5, 1976 extradition proceedings. Also at that proceeding a new preliminary examination date was set for February 13, 1976.

Appellant further shows that the District Court further said at the February 5 hearing on page twenty-three of its transcript, that it would not allow testimony other than as to the face of the warrant when it arrived.

Appellant further shows that there is a third mittimus in said file dated February 5, 1976, referring to the offense a fugitive from justice, stating "demanded examination" continuing the bond at $10,000 and setting the preliminary examination to be held on April 2, 1976 at 9:00 a.m. Appellant further shows that District Court Judge Higgs, on February 9, 1976, ordered the dismissal of the receiving and concealing case which was scheduled for examination on February 13, 1976, 5-4687H upon request of the Prosecuting Attorney of Bay County dated February 5, 1976. Neither the defendant, nor his counsel, received notice of said request nor order of dismissal until after they were entered. Appellant further shows that on February 9, 1976 Judge Higgs signed another commitment on failure to furnish bond charging the defendant as a fugitive from justice, and ordered his appearance on April 2, 1976 at 9:00 a.m.

Appellant further shows that in spite of the Honorable Judge Higgs' statements in the commitment orders of January 12 and February 9, no examination was ever conducted in the presence of this counsel.

Appellant further shows that on March 1, 1976 a verified complaint for declaratory judgment and order to show cause for temporary injunction and exparte restraining order were filed with the Court, a copy of which is attached hereto. Appellant further shows that the only defendants upon whom personal service was obtained were the Bay County Prosecutor, the Bay County Sheriff, and District Judge Arthur E. Higgs, a hearing was set for March 22, 1976 at 9:30 a.m.

Appellant further shows that on or about March 15, 1976 unbenounced to counsel for the defendant, defendant had a jail officer, Frank Przydylski, deliver a hand-printed document entitled "Writ of Habeas Corpus" a copy of which is attached, requesting the court to release him on March 16, 1976 to the Honorable Judge Dardas of the Bay County Circuit Court. Appellant further shows that according to testimony on a hearing in this case said jail officer delivered the papers to Judge Dardas' bailiff or secretary and also delivered a copy of said document to the Prosecuting Attorney's Office on the day he was given them which was March 15, 1976. Appellant further shows that somehow the original document and a copy of it appeared in the District Court file no. 6-4023H.

That the Order to Show Cause hearing for temporary injunction and restraining order originally set for March 22 was adjourned until March 29, 1976 to allow time to effect service.

And further counsel for the defendant after learning of the document entitled "writ of habeas corpus," obtained a copy of said writ from the defendant and filed a copy on March 23, 1976 in the Circuit Court file.

Appellant further shows that attorney for the defendant then filed on March 26, 1976, a petition for writ of habeas corpus a copy of which is attached, entitled: In The Matter of the

Petition of Harold William Doran for Writ of Habeas Corpus, referring to file no. 76-207-T in the Circuit Court for the County of Bay and Judge Theiler set hearing for March 29, 1976. Appellant further shows that on March 29 the Court conducted a hearing pursuant to the Writ of Habeas Corpus filed by counsel on March 26, 1976, only.

Appellant further shows that on behalf of the defendant, the attorney for the defendant subpoenaed the following witnesses: Sheriff Francis E. Bowen, Honorable Leon R. Dardas, Circuit Judge, George Mullison, Assistant Prosecuting Attorney, Eugene C. Penzien, Prosecuting Attorney, Honorable Arthur E. Higgs, District Judge, James Monaghan, Bay County Sheriff's Department, James Palmer, Bay County Sheriff's Department, Frank Przybylski, Bay County Sheriff's Department, and Ron Monville, Bay City Police Department.

Appellant further shows that Judge Theiler suppressed the subpoenaes of Judge Dardas, Judge Higgs, Sheriff Bowen, Prosecuting Attorney Penzien, Assistant Prosecuting Attorney Mullison. Appellant further shows that testimony taken in District Court File No. 6-4023H was accepted in evidence. The errors alleged were presented to the Court by way of testimony and the District Court File No. 6-4023H.

Appellant further shows that the Court ruled at said habeas corpus hearing that it felt there was error with regard to the commitment of Mr. Doran prior to the arrival of a Governor's Warrant, but it doesn't have any effect of the said warrant and that said warrant should be tested on its own without respect to the prior commitment proceedings.

Appellant further shows that the Circuit Court on March 29 arraigned Harold Doran on a Governor's Warrant and is presently holding the defendant pursuant to an Order for Commit-

ment dated April 14, and committing him to the custody of the Bay County Sheriff until April 23, 1976, which was the time set for the filing of an application for writ of habeas corpus pursuant to said warrant. The Court also ruled that it would not stay its proceedings for appeal purposes of the writ.

Appellant further shows that the Court in addition said that the verified complaint for declaratory judgment and order to show cause for temporary injunction could be handled simultaneously with the writ of habeas corpus pursuant to the Governor's Warrant, and it would not grant a stay of proceedings to allow for a separate hearing with respect to pleadings nor a stay to allow for an appeal of his decision with respect to them.

Appellant further shows that the Court has extended the time for filing the Petition for Writ of Habeas Corpus pursuant to the Governor's Warrant to April 30, 1976.

Appellant further shows that the Court is holding the defendant without bail.

Appellant further shows that the defendant unbeknownst to this attorney until April 27, 1976, filed on April 26 a handwritten document entitled "Motion for Petition Asking Superintending Control," a copy of which is attached.

Appellant further shows that due to the fact that it was over 90 days from the date of appellant's arrest, December 18, 1975, to the date of his arraignment on the Governor's Warrant on March 29, 1976. The People of the State of Michigan violated the extradition statutes of the State of Michigan MCLA 780.

Appellant further shows that said statutes were further violated by the fact that the District Court did not provide

for a preliminary examination with the presence of counsel before proceeding on commitment orders.

Appellant further shows that the commitments were in violation of the constitutional right to be informed as to why he is being held, in that all warrants, complaints, and commitment orders in the District Court File were absent of any statutory reference or other legal authority for commitment.

Appellant further shows that the commitment was illegal because there was nothing in the District Court File in writing from the State of Arizona swearing that there was a warrant for Mr. Doran in Arizona.

Appellant further shows that the commitment was illegal because a document entitled "writ of habeas corpus" was not properly dealt with in the Bay County Circuit Court.

Appellant therefore prays that upon the hearing hereof, this Honorable Court will grant leave for an appeal in the nature of mandamus or certiorari from the order of Circuit Court Judge John X. Theiler dismissing defendant's Petition for Writ of Habeas Corpus and dismiss the Governor's Warrant and cause defendant to be dismissed from custody and further that this Court set a reasonable bond in the interim.

And further, that in the event the warrant not be dismissed, the Circuit Court be ordered to proceed to hearing and ruling on the declaratory judgment and order to show cause for temporary injunction, before requiring a writ of habeas corpus.

(s) William J. Caprathe

Dated: April 28, 1976

In the Circuit Court for the County of Bay
COMPLAINT FOR WRIT OF HABEAS CORPUS
(Filed April 30, 1976)

NOW COMES HAROLD WILLIAM DORAN, Petitioner herein, by and through his attorney, William J. Caprathe of the Bay County Public Defender's Office, and for his complaint for the issuance of a writ of habeas corpus says as follows:

1) That the Petitioner in whose behalf the writ is applied for is restrained of his liberty pursuant to an order for commitment signed by the Honorable John X. Theiler, in the Circuit Court for the County of Bay on the 14th day of April, 1976, which refers to a Warrant issued by the Governor of the State of Michigan calling for the extradition of Harold W. Doran to the State of Arizona.

2) That the place of the restraint is the Bay County Jail, County of Bay and State of Michigan.

3) That this petition on behalf of Harold W. Doran, Petitioner, for habeas corpus is specifically permitted by the provisions of the Uniform Criminal Extradition Act, being M.C.L.A. 780.

4) That the said restraint according to the best of the knowledge and belief of the undersigned is based upon an alleged warrant issued in the State of Arizona charging the petitioner with theft of motor vehicle, or in the alternative: theft by embezzlement.

5) That the said restraint is illegal for all of the reasons contained in the petitioner's Application for Leave to Appeal and the documents attached thereto, filed with the Michigan

Court of Appeals on April 28, 1976, copies of which were filed in the Circuit Court and were served upon the Prosecuting Attorney.

6) That the said restraint is illegal in that the petitioner is not a fugitive from the State of Arizona and the documents served upon him purporting to be a Governor's Warrant are invalid.

(s) Harold William Doran

Subscribed and sworn to before me this 30th day of April, 1976.

(s) William J. Caprathe
Notary Public, Bay County, Michigan
My commission expires: .....

IN THE JUSTICE COURT DR #75-120589 PPD
EAST PHOENIX I PRECINCT, MARICOPA COUNTY,
STATE OF ARIZONA

STATE OF ARIZONA, Plaintiff v. HAROLD WILLIAM DORAN aka TED FOSTER Defendant(s)	No. 9204 COMPLAINT (FELONY)

THEFT OF MOTOR VEHICLE OR IN THE ALTERNATIVE: THEFT BY EMBEZZLEMENT

The complainant herein personally appears and, being duly sworn, complains (on information and belief) against HAROLD WILLIAM DORAN aka TED FOSTER charging that in EAST PHOENIX I Precinct, Maricopa County, Arizona: on or about the 3rd day of DECEMBER, 1975, HAROLD WILLIAM DORAN aka TED FOSTER took from WAYNE W. KAHLER a motor vehicle described as follows, to-wit: 1973 FORD PICKUP, ½ TON, F100, 1975 California License Number 188MGL, VIN 10GCQ67368, with the intent to permanently deprive WAYNE W. KAHLER of such motor vehicle, all in violation of A.R.S., Sec. 13-672(A) & (B), as amended 1975 and 13-1645.

OR IN THE ALTERNATIVE: THEFT BY EMBEZZLEMENT

That in EAST PHOENIX I Precinct, Maricopa County, Arizona: on or about the 3rd day of DECEMBER, 1975, HAROLD WILLIAM DORAN aka TED FOSTER committed theft by

embezzling from WAYNE W. KAHLER property, to-wit: One (1) 1973 FORD ½ TON PICKUP, F100, VIN 10GCQ-67368, 1975 California License Number 188MGL, of the value of over $100.00, all in violation of A.R.S., Sec. 13-681, 13-682, as amended 1972, and 13-688, 13-671, 13-661, 13-662, 13-663.

Complainant C/L Richard Bishop /s/
Agency or Title PPD.

Subscribed and sworn to before me on 1-7-76.
Mary Jo Dixman, J.P.
Magistrate Acting Title

It is requested that a (X) warrant, ( ) summons be issued.

It is, is not requested that Defendant appear for fingerprints and photograph.

NORVAL JESPERSON
Deputy County Attorney

IN THE JUSTICE COURT
EAST PHOENIX #1 PRECINCT, MARICOPA COUNTY, STATE OF ARIZONA

THE STATE OF ARIZONA vs. HAROLD WILLIAM DORAN Defendant(s)	No. 9204 DR #75-120589 PPD

WARRANT FOR ARREST
"AMENDED"

TO ALL PEACE OFFICERS OF THE STATE OF ARIZONA:

A complaint has been filed in this court against HAROLD WILLIAM DORAN aka TED FOSTER charging that in East Phx. #1 Precinct, Maricopa County, Arizona, on or about the 3rd day of December 1975, the crime of Felony, to-wit: THEFT OF MOTOR VEHICLE or in the alternative: THEFT BY EMBEZZLEMENT has been committed.

I have found reasonable cause to believe that such offense(s) were committed and that the accused committed them, and reason to believe that the accused will not appear in response to a summons, or that a warrant is otherwise appropriate.

YOU ARE THEREFORE COMMANDED to arrest the accused and bring him before this court to answer the charges. If this court is unavailable, or if the arrest is made in another county, you shall take him before the nearest or most accessible magistrate. You may release him if he posts a secured appearance bond in the amount of ..... dollars ($ .....).
Date: April 26, 1976
DR No: #75-120589 PPD.

(Signature deleted)
Justice of the Peace

CERTIFICATION

I hereby certify that the attached is a true and correct copy of the Warrant and Complaint entered in the Criminal Docket, Cause No. 9204—Page No. 204—Book No. 18 in the Justice Court of the East Phoenix No. 1 Precinct in the matter of THE STATE OF ARIZONA v. HAROLD WILLIAM DORAN aka TED FOSTER.

DONE this 26th day of April, 1976.

(signature deleted)
JUSTICE OF THE PEACE

AFFIDAVIT

STATE OF ARIZONA }
County of Maricopa, } ss.

WAYNE STEWART, being first duly sworn upon his oath deposes and says:

1) That he is a Deputy County Attorney for Maricopa County, assigned to the Complaint Department and is authorized to execute this Affidavit and believes the below information to be true and correct.

2) That on APRIL 26, 1976, WAYNE STEWART personally contacted Judge Weeks, Justice of the Peace, East Phoenix I Precinct, Maricopa County, State of Arizona, and moved to amend the Warrant and Complaint in this Cause #9204 to strike the incorrect date of DECEMBER 18, 1975 and insert in its place therein corrected date of DECEMBER 3, 1975.

3) That on APRIL 26, 1975, Judge Weeks granted the states motion to amend the aforementioned Complaint and Warrant to reflect the correct date of DECEMBER 3, 1975.

4) That the attached copies of the amended Warrant and complaint are true and correct copies of the originals on file with the Court in this cause.

Wayne Stewart /s/
WAYNE STEWART

Subscribed and sworn to before me this 29th day of APRIL, 1976.

(Signature deleted)
Judge of the Superior Court

ORDER—JUSTICE OF THE PEACE OF EAST PHOENIX JUDGE'S COURT ORDER

CAUSE NO: #9204 HAROLD WILLIAN DORAN aka TED FOSTER

Date: April 26, 1976.

Felony, to-wit: THEFT OF MOTOR VEHICLE or in the alternative: THEFT BY EMBEZZLEMENT

State moves to amend warrant and complaint.

Motion granted.

Warrant and complaint amended to read, "on or about the 3rd day of December, 1975," and delete, "on or about the 18th day of December, 1975,".

(Signature deleted) [SEAL]
Justice of the Peace of
East Phoenix #1 Precinct

cc: C. A. — Deputy
C. A. — Files
M.C.S.D. — Warrants

COURT OF APPEALS ORDER DENYING APPLICATION FOR LEAVE TO APPEAL

AT A SESSION OF THE COURT OF APPEALS OF THE STATE OF MICHIGAN, Held at the Court of Appeals in the City of Detroit, on the 4th day of May in the year of our Lord one thousand nine hundred and seventy-six.

Present the Honorable
VINCENT J. BRENNAN
Presiding Judge

S. JEROME BRONSON
WILLIAM R. BEASLEY
Judges

In Matter of Extradition: PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v HAROLD WILLIAM DORAN, Defendant-Appellant.	Docket # 28507 L.C. No. 76-207-T

In this cause motions are filed by defendant-appellant for application for emergency leave to appeal, for stay of proceedings in lower court, for bond pending appeal, and for immediate consideration, and nothing in opposition thereto having been filed, and due consideration thereof having been had by the Court,

IT IS ORDERED that the motion for immediate consideration be, and the same is hereby, GRANTED.

IT IS FURTHER ORDERED that the application for emergency leave to appeal be, and the same is hereby, DENIED.

IT IS ORDERED that the motion for stay of proceedings in lower court be, and the same is hereby, DENIED.

IT IS ORDERED that the motion for bond pending appeal be, and the same is hereby, DENIED.

STATE OF MICHIGAN—ss.

I, Ronald L. Dzierbicki, Clerk of the Court of Appeals of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court of Appeals at Lansing, this 5th day of May, in the year of our Lord one thousand nine hundred and seventy-six.

RONALD L. DZIERBICKI /s/
Clerk

BAY COUNTY CIRCUIT COURT
APPOINTMENT OF ATTORNEY

Proper showing having been made to the Court that the Defendant is unable to obtain counsel and is entitled to have an attorney appointed to represent him in the appeal of this proceeding to the Supreme Court of the State of Michigan and that the Public Defender's Office has indicated that they need the assistance of outside counsel.

IT IS HEREBY ORDERED:

That the State Appellate Defender's Office, an Attorney at Law, whose business address is Third Floor, North Tower, 1200 Sixth Avenue, Detroit, Michigan 48226, be assigned as appellate counsel for said defendant, to assist the Bay County Public Defender's Office in representing Petitioner.

(s) John X. Theiler
Circuit Judge

Dated this 5th day of May, 1976.

STATE OF MICHIGAN
IN THE SUPREME COURT

IN MATTER OF EXTRADITION People -vs- HAROLD DORAN Defendant-Appellant.	Court of Appeals No. 28507 Lower Court No. 76-207-T

DELAYED APPLICATION FOR LEAVE TO APPEAL

NOW COMES the above-named Defendant-Appellant, by his attorneys, the STATE APPELLATE DEFENDER OFFICE, by KATHLEEN M. CUMMINS, and moves this Honorable Court to grant leave to appeal and states in support thereof the following:

1. On December 18, 1975 Harold William Doran, while en route from Arizona to Bay City, was arrested in Bay County and charged with receiving and concealing stolen property. This charge arose from Mr. Doran's possession of the truck in which he had driven from Arizona.

2. Immediately following his arrest, the Bay City Police notified authorities in Maricopa County, Arizona, and on January 7, 1976, Maricopa County issued a warrant against Mr. Doran for theft of a motor vehicle or in the alternative theft by embezzlement.

3. On January 12, 1976, the Bay County prosecutor filed a fugitive complaint pursuant to the Arizona warrant against Mr. Doran, and on the same day Mr. Doran was arraigned on the fugitive warrant in 74th district court. At this hearing, a

bond of $10,000 was set. This was the first effort to set bond since Mr. Doran's initial incarceration in the Bay County Jail on December 18, 1975. Mr. Doran was recommitted to jail upon failure to post bond and further proceedings were adjourned to February 5, 1976.

4. In the interm, the Bay County Public Defender was appointed to represent Mr. Doran. A preliminary examination on the Bay County charge was never held, although requested by defendant January 12 and 21, 1976. This charge was dismissed by the Bay County prosecutor February 5, 1976, over the objection of defense counsel. (See transcript of February 5, 1976 hearing in 74th distirct court, p. 21).

5. At the February 5 hearing, the district court granted the prosecutor's request for a second commitment of sixty days in which to obtain a governor's warrant (February 5, p. 2). A defense motion for reduction of bond was denied (February 5, p. 4).

6. On February 11, 1976 the State of Arizona issued a requisition to Michigan for the extradition of Mr. Doran.

7. On March 22, 1976, the State of Michigan issued a governor's warrant for Mr. Doran's arrest. By this date, Mr. Doran had been incarcerated in the Bay County Jail 94 days.

8. On March 26, the Bay County Public Defender filed a petition for writ of habeas corpus attacking the governor's warrant on the grounds that it had been issued after the 90 day time limit set by the Uniform Criminal Extradition Act (MCLA 780.1-31).

9. On March 29, 1976, Mr. Doran was arraigned on the governor's warrant before the Honorable John X. Theiler in Bay County Circuit Court. Judge Theiler dismissed the petition for writ of habeas corpus, finding that although there was error with regard to the commitment of Mr. Doran prior to the arrival of a governor's warrant, this error did not affect the validity of the warrant, which would have to be independently attacked.* Judge Theiler refused to grant a stay of extradition so that an appeal could be taken from his dismissal of the March 26 writ.

10. At the March 29 proceeding Judge Theiler gave Mr. Doran until April 30, 1976, in which to file another petition for writ of habeas corpus. The judge stated that he would also hear the public defender's previously filed complaints for injunctive and declaratory relief at the time of the hearing on the second writ of habeas corpus.

11. On April 28, 1976, the Bay County Public Defender filed in the Court of Appeals an application for leave to appeal the dismissal of the March 26 habeas corpus action.

12. On April 30, 1976, the Bay County Public Defender filed a second petition for writ of habeas corpus, renewing his attack on the illegal restraint of Harold Doran and raising the questions of fugitivity and of the validity of the governor's warrant. Judge Theiler has set this petition for hearing on August 10, 1976. This adjournment date has acted as a de facto stay of extradition.

13. On May 5, 1976 the Court of Appeals denied the public defender's application for leave to appeal and also refused

---

*The State Appellate Defender Office has requested, but not received transcripts of the hearings held in Bay County Circuit Court in this matter. However, the court reporter has informed appellate counsel that she is overloaded with work and could not estimate when she would be able to prepare these transcripts. Due to the emergency nature of this proceeding appellate counsel is filing this application before receipt of these transcripts, which will be forwarded to this Court upon receipt.

to grant bond or a stay of extradition. (Defendant had been held without bond since the March 29 arraignment on the governor's warrant.)

14. On May 7, 1976, the State Appellate Defender Office was appointed by Judge Theiler to appeal the Court of Appeals order.

15. Appellant contends that the dismissal of his petition for writ of habeas corpus, affirmed by the Court of Appeals, was clearly erroneous for the following reasons.

A. THE GOVERNOR'S WARRANT WAS INVALID SINCE IT WAS ISSUED IN EXCESS OF 90 DAYS AFTER APPELLANT'S ARREST.

Michigan has adopted the Uniform Criminal Extradition Act. MCLA 780.1-31; MSA 28.1285(1)-(31). Sections 14 and 16 of this act provide that once an examination before a judge or magistrate in the asylum state has revealed that defendant is charged with a crime in the demanding state and has fled from that state, the accused may be committed twice: once for 30 days and secondly for an extension period of 60 days, to await the issuance of a governor's warrant. The plain import of these sections is if the governor's warrant is not perfected sometime during these two commitments (totalling 90 days), the accused must be discharged. In *In Re Albert L. White*, 2 Mich App 493 (1966) the Court of Appeals held that if the alleged fugitive was not arrested under warrant of governor within 30 days, the statute allowed a second commitment for 60 days, but in no case did the statute authorize a third commitment.

In the case at bar, Mr. Doran had been detained for longer than 90 days by the time the governor's warrant was

issued (on March 22, 1976). He had been detained for 102 days by the time he was actually arraigned on the governor's warrant.

MCLA 780.13 of the extradition act provides that in cases where a potential extraditee is arrested without a fugitive warrant

> ". . . the accused must be taken before a judge or magistrate with all practicable speed and complaint must be made against him under oath setting forth the ground for the arrest as in the preceding section*; and thereafter his answer shall be heard as if he had been arrested on a warrant."

However, in this case this initial judicial determination of fugitivity did not take place until the 74th district court hearing on January 12, 1976. Since the delay of almost a month in bringing Appellant before a magistrate was not due to Appellant's request, but to the prosecutor's neglect, the statutory period for issuance of the governor's warrant cannot, in fairness, be held to run from the January 12 appearance. Rather, the period should run from the date Appellant was detained for the purpose of extradition. It is clear that the Bay County prosecutor never had any real intention of proceeding on the Michigan charge and that this charge was merely a pretext upon which to detain Appellant until the initial warrant from Arizona arrived. The fact that the Arizona authorities were notified immediately after Appellant's arrest further strengthens the implication that the sole purpose of Appellant's detention, from its outset on December 18 was to hold him for extradition to Arizona.

Since no governor's warrant was issued within ninety days of December 18, 1976, the date Appellant was, in effect, first

---

*MCLA 780.12.

detained as a fugitive, *White*, supra requires that he be discharged.

B. APPELLANT MUST BE DISCHARGED WHERE THE REQUISITION TENDERED BY THE DEMANDING STATE WAS NOT VISIBLY SUPPORTED BY AN ADEQUATE JUDICIAL FINDING OF PROBABLE CAUSE.

Arizona's requisition, upon which the Michigan governor's warrant was based, was supported by the following items: 1. a complaint by Richard Bishop a police officer of the East Phoenix 1 precinct, sworn to before a justice of the peace, and an arrest warrant issued by the same justice of the peace, both dated January 7, 1976, 2. the affidavit of another Maricopa county police officer, Thomas Bradley attesting to the fact that an attached photo of Harold Doran depicted the same person as that charged with theft/embezzlement of a motor vehicle, issued February 3, 1976, an affidavit by the same police officer attesting to contact with unnamed people "having knowledge of the crime" and preparation of reports, also issued February 3, a certification of the arrest warrant and complaint by Dean M. Wolcott, a Maricopa County attorney, applying for requisition and a recommendation for requisition signed by an assistant Arizona attorney general. (See Appendix).

Richard Bishop's complaint (supporting the January 7 warrant) reads as follows:

> "On or about the 18th day of December, 1975, Harold William Doran a/k/a Ted Foster took from Wayne W. Kahler, a motor vehicle described as follows, to wit: 1973 Ford Pickup ½ ton, F 100 1975 California License No. 188 MGL VIN 10 GCQ 67368, with the intent to permanently deprive Wayne W. Kahler of such motor vehicle, all in violation of A.R.S., sec 13-672 (A) (B), as amended 1975 and 13-1645.
>
> OR IN THE ALTERNATIVE: THEFT BY EMBEZZLEMENT.
>
> "That in East Phoenix I Precinct, Maricopa County, Arizona: on or about the 18th day of December, 1975, Harold William Doran a/k/a Ted Foster committed theft by embezzling from Wayne W. Kahler property, to-wit: One (1) 1973 Ford ½ Ton Pickup, F100, VIN 10GCQ6768, 1975 California License Number 188 MGL, of the value of over $100.00, all in violation of A.R.S., Sec. 13-681, 13-682, as amended 1972, and 13-688, 13-671, 13-661, 13-662, 13-663."

Apart from filling in date, place, alleged stolen object and ownership, this complaint merely recited Arizona's statutory descriptions of larceny and embezzlement.* The complaint did not show any personal knowledge by the complaining officer of the facts of the crime.

Neither the Uniform Criminal Extradition Act nor the Federal statute on extradition (18 USC §3182 (1964)) expressly require that a requisition be supported by probable cause. Both statutes state that extradition is dependant upon submission to the asylum jurisdiction of an indictment, or an affidavit made before a magistrate, charging a felony. However, case law interpreting 18 USC 3182 (to which the Extradition Act is

---

*Theft of a motor vehicle:
ARS 13-672(A)
13-1645
13-661-663
13-671
13-682

Theft by Embezzlement:
ARS 13.688

expressly subject, MCLA 780.2, *Williams* v *County Sheriff*, 395 Mich 204, 213 (1975), have held that where the rendition request is supported by a warrant rather than indictment such warrant *must* satisfy the asylum state that probable cause exists for charging a felony *before* rendition can take place. *Kirkland* v *Preston*, 385 F 2d 670 (DC Circuit 1967); extradition of the Appellants from the District of Columbia to Florida was sought merely on the basis of the affidavit of a Miami police officer, sworn to before a justice of the peace, and an arrest warrant issued by the Justice of the peace. The affidavit did not reflect personal knowledge of the facts of the crime by the complaining officer but merely alleged the offense in the statutory language. The D.C. Circuit Court discharged the defendants, holding that the complaint did not show probable cause since it did not spell out the key details of the offense but was framed in conclusory, statutory language only. *Kirkland* was cited approvingly by Justice Williams' opinion in *Williams* v *Wayne County Sheriff*, 395 Mich 204, 238-240 (1975).

A recent federal case, *Ierardi* v *Gunter*, 528 F 2d 929 (CA1, 1976), held that although the probable cause determination did not necessarily have to be made by the asylum state, "the neutral and detached judgment of a judicial officer or tribunal" or minimally "some form of judicial process" determining probable cause was an absolute prerequisite to rendition. *Kirkland*, supra, 673 makes clear that before the asylum state can be satisfied that there is probable cause for believing the accused is guilty, the complaint supporting requisition must at least report or summarize enough evidence to justify issuance of an arrest warrant in the accusing state.

Appellant contends that the affidavits supporting Arizona's requisition do not reflect a judicial probable cause determination sufficient to justify rendition by Michigan and moreover that the affidavits do not reflect enough probable cause to charge a felony in Arizona.

The complaint of Richard Bishop is framed in conclusory, statutory allegations and in fact is almost identical in form to the officer's complaint in *Kirkland*. This affidavit does not recite key details of the offense and is based only on information and belief.

The affidavits of Thomas Bradley were not supporting affidavits of the justice of the peace warrant but were issued almost a month later. However, they did nothing to supplement the insufficient showing of probable cause offered by the original complaint. One of Bradley's affidavits merely identified a photo of Harold Doran as the person whose extradition was being sought. The other deposed that the officer had access to reports, statements, etc. and persons having knowledge of the crime without detailing or attaching any of these purported statements. This is contrary to *Kirkland's* injunction that since the accused will not have the benefit of a preliminary probable cause hearing before extradition, probable cause must be spelled out in the supporting affidavits themselves. See *Kirkland*, supra 676.

Further, the determination of probable cause reflected by the Arizona warrant issued by a justice of the peace may have been too informal to satisfy Michigan standards. Michigan has abolished the justice courts and felony warrants must now be issued by magistrates who are licensed to practice law. MCLA 600.9921(1)(a); 600.9922; 600.8317; 600.8311(a)-(d); 600.8201. In contrast, Arizona justices of the peace are not required to be lawyers (and most aren't): the only qualification for the office is registered voter status. *State* v *Lynch*, 107 Ariz 463, 489 P 2d 697, 698 (1971); *State* v *Dziggel*, 16 Ariz App 289, 492 P 2d 1227 (1972); *Crouch* v *Justice of the Peace*, court of the 6th pct, 7 Ariz App 460, 440 P 2d 1000 (1968); Hink, *Judicial Reform in Arizona*, 6 Ariz L Rev 13, 24-25 (1964-65).

Moreover, in Arizona an affidavit may be sufficient to launch

the process leading to arrest and yet not show probable cause. Ariz R. Crim Proc 1, 2, 17 ARS. That is because in Arizona the complaint can be supplemented by the magistrate's personal examination of the complainant or other witnesses. Arizona makes such supplemental examination the magistrate's duty where the complaint is made upon information and belief. In *State* v *Lynch*, supra, where the defendant alleged that the justice of the peace had interviewed the complaining witnesses before conducting a preliminary hearing, the Arizona court held:

> "The complaint in this case was filed by a third party adult with no personal knowledge of the crime. . . we held such complaints to be proper . . . But when a complaint is made in information and belief, there arises a duty upon the magistrate or justice of the peace to make further inquiry into the source of the complainants information and the grounds of his belief. The purpose of this investigation is to protect the accused from frivolous and malicious charges. From this, the magistrate will subsequently be able to determine in his own mind whether probable cause exists to support a warrant." *Lynch*, supra, 489 P 2d 697, 698 (1971).

Neither the Arizona warrant nor anything else in this record indicates that the justice of the peace made any attempt to make further inquiry into the source of the information contained in the police officer's complaint. A warrant and complaint that is insufficient to show probable cause in the accusing state cannot satisfy the asylum state that there is probable cause for rendition of the accused. *Kirkland* v *Preston*, supra, 675.

Since the affidavits supporting the Arizona requisition do not present an adequate judicial finding of probable to satisfy the Fourth Amendment, Harold Nolan must be discharged.

C. The subject matter outlined in issues A and B, above, involves legal principles of major significance to the jurisprudence of Michigan. GCR 1963 851.1(1). The effect of failure to issue a governor's warrant within the 90 days prescribed by the Extradition Act (Issue A) as well as what standard of sufficiency will be applied to a requisition supported by a warrant and complaint, are both, as far as Appellant can ascertain, questions of first impression in Michigan. This Court has evolved standards for testing the sufficiency of an extradition request based on a grand jury indictment, which contains a built in guarantee of probable cause. *Williams* v *Wayne County Sheriff*, 395 Mich 204 (1975). However, no Michigan standard has been developed to test the adequacy of a requisition request supported solely by a complaint and warrant. Appellant's case would provide a vehicle for developing such a standard.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant his Delayed Application for Leave to Appeal.

Respectfully submitted,

STATE APPELLATE DEFENDER OFFICE

BY: KATHLEEN M. CUMMINS /s/
KATHLEEN M. CUMMINS
Assistant Defender
Third Floor, North Tower
1200 6th Avenue
Detroit, Michigan 48226
256-2814

Dated: July 27, 1976

EXCERPTS FROM HABEAS CORPUS HEARING IN BAY COUNTY CIRCUIT COURT

(42) * * * THE COURT: The Defendant, Respondent, Petitioner, was arrested in this State on the 18th of December. It would appear that he was then charged with possession of a motor vehicle, that having been stolen and having a value of more than a Hundred Dollars and knowing it to have been so stolen which would be a valid charge under Michigan law.

I would presume that even if a person steals in one State and in a continued asportation crosses the State line and even though it's a continuation of the original larceny, a new offense is committed in the new State. He has either (43) stolen in the new State, a continuation of the original offense, or if that terminates with the State line as an affront of that sovereignty, not this sovereignty, then he affronts this sovereignty by that which he stole before. I don't have any citations on it but that sounds logical to me, so I see no reason why the charge brought by the Michigan authorities wasn't a valid charge under Michigan law, if in fact there had been a stealing of a car outside of the State, or an embezzlement whether it's larceny by embezzlement or larceny by trick or larceny by simple stealing. There's nothing to indicate that this proceedings then was invalid. So frequently it happens, however, when there are multiple offenses, when a State apprehends a subject, finds that he was wanted with something in conjunction with that transaction in another State that they're willing to forego criminal prosecution and allow the other State to go ahead with it, so I don't think there's anything improper, that it was indicated that Arizona contended that the property had been stolen in Arizona and was willing to extradite. This State then decided that would suffice and that further criminal procedures were not required, so I'm not satisfied that the time for the running of time—and I think I've passed on this before, or at

least I've had it brought to (44) my attention before—that the statutory time for procedures started at the time of the arrest. I'm not going to attempt to state exactly and go back and dig these time intervals out but I'm not going to adopt that concept, so the statutory period of time had not expired when the Governor issued his warrant on the request for extradition and the Court was so apprised of it, so it's our finding that that was valid and had been acted upon within the valid statutory period of time.

The writ of habeas corpus proceeding then raises and can raise certain issues and I don't believe all of them are really raised here. First of all, there's an attack on the validity of the complaint and warrant. I don't believe this is really an attack on whether or not the complaint sets forth the complaint of a violation of a statute of the State of Arizona. I have no showing that their statutes are so dissimilar from ours that it would be, probably, a valid averment under our statutes as set forth in their two counts, that they don't have any such statute, or that his does not cover an extraditable offense from Arizona.

The issue is raised as to the fact that there are two counts and they would appear to be inconsistent. I presume and assume that they would be under Michigan law and I (45) assume the same thing is true of Arizona that if the Respondent were charged with both of these, he could only be convicted of one. In other words, if he were entrusted with the property that he couldn't be then charged with having taken the property and stolen it, but it certainly doesn't shock me that there could be an averment of violations of two separate statutes in the same charge, and so I don't think the fact that they are perhaps and probably inconsistent means that they're invalid because they're set forth in the same information or same complaint.

I don't find that the complaint and warrant then charges invalidly on the complaint and warrant.

Insofar as that indicates a lack of information sufficient to permit a probable cause it's my understanding that a presumption of validity is to be applied to the actions of the magistrate in taking the complaints and further that Arizona law would permit the supplementation of the bear bones of a complaint by other information such as testimony of time.

We've been submitted cases where the evidence as it goes to the jury would submit similar alternate findings. The fact that they're inconsistent doesn't mean that a jury can't beyond a reasonable doubt find a defendant guilty of one or the (46) other, so I don't think that is a valid argument, the fact that they are inconsistent indicates the lack of probable cause and the determination that there had been a crime committed in the alternative as set forth, it's my finding is not invalid.

The complaint and warrant as forwarded on to the Governor in our opinion is valid on its face. I believe that the Governor has a right to require additional information to go behind that warrant, especially in this area of the discretionary power, or at least the power even if it may not be entirely discretionary, the power that a governor has to issue or to not issue, that it is within his power to demand additional information over and beyond that.

It's complained that additional information furnished is insufficient. It may well be that if I were wanting additional information I'd want it more detailed than was furnished here. I might want a recital more of what the evidentiary facts would be, but apparently the Governor didn't request that and I don't think the issue as raised is sufficient to indicate that the material furnished to him was sufficient to mean that his determination to rely upon the presumption of validity of the complaint and warrant even though supplemented with material that wasn't too extensive, that it was improper.

(47) Certainly, there has been an indication that the Arizona authorities, and I don't think this was shown to our Governor, but that additional information was so listed by our local authorities from Arizona authorities and that does go to the other issue and that is whether or not the Defendant is the person named in the warrant and the complaint is made here that the affidavit as furnished as to identity contains a bear bones recital that he is the same person and that it isn't fleshed out by showing what those evidentiary facts are that require that showing.

It is our opinion that the procedures here were sufficient to have identified the defendant as being that individual charged under all the circumstances, including a photograph that was forwarded on the affidavit of identity and the fact that we have no direct evidence indicating contra.

As to the other issue it's our opinion that there's been a sufficient showing of the validity of the charge, of the fact that the Defendant is the person identified and as being charged.

As to the other issue of whether or not it's shown that the Defendant was present in Arizona, or the converse, is a serious issue raised that he was not in Arizona. The (48) original complaint and warrant in specifying the 18th said "on or about" and that is ordinarily under common law in all the cases that I know of that the date of the offense is not ordinarily of the essence. There are certain circumstances, however, where it becomes important and in the case of an extradition it certainly becomes important. It is necessary to know when did

this offense occur since we do have the important issue, was the Defendant present there.

Presumably, then with the (sic) there averment that it was the 18th and the showing that the Defendant without doubt was here in the State of Michigan, was not therefore in Arizona, we would have a very serious issue in question as to whether or not how could he possibly be in Arizona. However, where there is an averment of a date, it can either be specified exactly by a bill of particulars or it can be modified by amendment and the question then is while the original complaint alleges the 18th, or the original information alleges the 18th and the proofs at trial, or subsequently show that it wasn't the 18th but actually some other date, but the date is subject to amendment even after trial absent some showing as to why it shouldn't be so amended in ordinary cases and I have nothing to indicate that we have anything not ordinarily amendable in this case, but over and beyond the issue as to his presence in (49) Arizona.

The amendment of the complaint, or the equivalent of a furnishment of a bill of particulars that it wasn't actually the 18th but it was actually the 3rd of December and I note there is no direct attack on his presence in Arizona at that time. The attack is on the effect of the showing that the actual date wouldn't have been the 18th but rather the 3rd, since the 18th is the date that can be amended and if it is amended and the offense can actually be shown to have been committed on the 3rd, the fact of the amendment in our opinion isn't such that it defeats further proceedings on the original complaint and warrant. However, we're back to the issue of—in other words, with a showing of the 18th, if this Court is shown that the offense is actually not on the 18th, 17th, 16th, or here the 3rd, and yet it's the same offense. The question for this Court to decide is when this offense occurred, was the Respondent

in Arizona and that's clear he wasn't there on the 18th. Therefor, whether or not this automatically decides it in view of the showing of the allegement here on the part of Arizona and with the amendment, however, as has been suggested we are on a procedure in reliance on the issuance of a Governor's warrant on a requisition from (50) Arizona with what may to our Governor be construed as immaterial deviation, and before this Court assumes that the Governor wishes to continue on the basis that it has been satisfactorily shown to him that the crime being charged was one where a defendant was in Arizona, that he should be apprised of the information that we have, that the alleged date is not the 18th but rather the 3rd, and that he should have the same information that we have, that the Defendant was here in Michigan on the 18th, or anything else and any other information that the Governor wants or deems necessary.

I think therefore that we should defer and give the Governor an opportunity to be informed of this variance on this same information that we have, that if he determines to withdraw this warrant, that's one thing, and if he refused then to issue another warrant, that would be a very definite change of circumstance, or if he were to withdraw this warrant and issue a new one, that would be another material change of circumstance and I don't think an extraordinary period of time should be provided in which this information is to be furnished to him to give him an opportunity to act and it would seem to me ten days would be an adequate period of time to get to the Governor this additional information to see whether he (51) wishes to withdraw this warrant and issue a new one or refuse to issue a new one or to require further proceedings before he would determine. If he elects to stand on his warrant as he has issued it that would be one thing and in that regard I will presume that is what he is intending to do —absent hearing something else that he intends to continue

the issuance of his warrant. Until that period of time is determined it would be my intent not to put the Petitioner to bond for the same reasons I expressed before. If after that ten days the Governor withdraws his warrant without issuing a new one I would intend to immediately to set a bond, and if he withdraws this warrant and issues another, I'll have to make a decision as to what we do on that.

I solicit comments.

MR. PENZIEN: The only comments I would have, your Honor, is that I don't know whether you had in mind the fact that I believe that next week is the Republican National Convention which Governor Milliken—

THE COURT: He may be on T.V.

MR. PENZIEN: And not available to the Defendant.

THE COURT: That's very practical. Let's face it however there are people assigned this problem and who

• • •

(Exchange between Bay County Prosecutor Eugene C. Penzien and Court concerning amendment of Arizona Complaint.)

(28)

THE COURT: The fact that the amended complaint and warrant has not been brought to the attention of the Governor, is that—

MR. PENZIEN (Interposing): No, and I submit, your Honor, that there is no need to do that. In the first place,

counsel is arguing that the Governor has bad information as to when the Defendant may have been in Arizona but I think you ought to remember what the Governor had was Arizona warrants that gave the date of offense as December 18th. It wasn't reversed. The warrant that the Governor had in front of him said December 11th and this warrant says December 18th. The Governor was operating on a basis of an Arizona warrant that said December 18th.

THE COURT: What's the significance of December 11th?

MR. PENZIEN: December — I'm sorry. It's December 3rd. 3rd is the one issued, made reference to, so I presumably — if Governor Milliken ordered on the basis of the warrants he had in front of him, he would all the more likely sign a warrant of extradition on the basis of one that said the offense occurred in Arizona on December 3rd, so that's the only purpose we even had in asking and pointing out to Arizona that there was an error and it's obviously an error in someone writing (29) down a date, that or typing in a date, the only purpose for that was that if Mr. Doran was going to argue that their warrant proved he wasn't there on the date that they say he was there, is the date of the offense that we would have contradicting evidence? He hasn't argued that.

Incidentally, in terms that this was a complaint about the sufficiency of the evidence, Mr. Doran has admitted to the Court that that's his name and he has also used the name of Ted Foster which is a name that is listed in the Arizona warrant.

THE COURT: He has not admitted specifically that he's the person charged.

MR. PENZIEN: No, but I believe we could go to the records and show you that he has stated — in any event, he

hasn't argued that he wasn't there and he has not offered any evidence that he wasn't there.

THE COURT: He's argued continually that he wasn't in Arizona on the 18th, the date of the original complaint.

MR. PENZIEN: Well, he really wasn't arguing that, but I wouldn't argue that with him anyway.

THE COURT: That was one of the things that seemed to bother me the most, was his argument that that was true, that he wasn't in Arizona and on that date.

(30)

MR. PENZIEN: What I mean is that he has not offered any evidence and I would not argue it with him, if he did, because I know as a fact he was in our jail on December 18th.

THE COURT: Is that the arrest date, the 18th?

MR. PENZIEN: Yes.

THE COURT: The Governor's Warrant is subject to being recalled; is it not?

MR. PENZIEN: By Governor Milliken.

THE COURT: That's what I mean.

MR. PENZIEN: Right.

THE COURT: If he determined that the Respondent was in Arizona and this Court is satisfied otherwise, it's my understanding that this writ would be controlling.

MR. PENZIEN: That's correct.

One more thing, like I said, I don't think I need to argue on the basis of this record that we have acted improperly as far as the Bay County Prosecutor's Office, but I want to point out because I'm certain that we'll be up further unless the Court releases Mr. Doran, that Miss Cummins when she stands here accusing me of abusing the authority of my Office has available in this very courtroom a witness who could testify as to what the reasons were for the issuance of the warrant against Mr. Doran. She didn't call that person and yet she would • • •

• • •

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF BAY

IN THE MATTER OF: THE EXTRADITION OF HAROLD WILLIAM DORAN TO THE STATE OF ARIZONA	FILE NO. 76-207 FZ

ORDER DENYING WRIT OF HABEAS CORPUS

At a session of said Court held in the Courthouse in the City of Bay City, County of Bay, State of Michigan on the 18th day of August, 1976.

PRESENT: HONORABLE JOHN X. THEILER,
CIRCUIT JUDGE

This matter came on to be heard before this Court on August 10, 1976 and was adjourned to August 13, 1976 due to the press of other business before the Court. On August 13, 1976 the Court heard arguments of counsel and gave its opinion on the record in open court.

NOW, THEREFORE, for the reasons indicated upon the record in open court,

IT IS ORDERED:

A. That the application for writ of habeas corpus for the purpose of preventing the extradition of Harold William Doran to the State of Arizona be and it is hereby denied.

B. A stay of extradition is hereby granted for a period of twenty days from and after the date of this order.

JOHN X. THEILER /s/
JOHN X. THEILER, Circuit Judge

APPROVED AS TO FORM:
WILLIAM CAPRATHE /s/
WILLIAM CAPRATHE,
Attorney for Harold William Doran

(Attestation Deleted)

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF BAY

HAROLD WILLIAM DORAN Appellant -vs- STATE OF ARIZONA, Governor of Arizona, Attorney General for State of Michigan, Prosecuting Attorney for the County of Bay, Governor of the State of Michigan, Bay County Sheriff, and Honorable District Judge Arthur E. Higgs Appellees	File No. 76-207-T
PEOPLE OF THE STATE OF MICHIGAN Plaintiff -vs- HAROLD WILLIAM DORAN Defendant	

APPOINTMENT OF ATTORNEY

Proper showing having been made to the Court that the Defendant is unable to obtain counsel and is entitled to have an attorney appointed to represent him in the appeal of this proceeding and that the Public Defender's Office has indicated that they need assistance of outside counsel,

IT IS HEREBY ORDERED:

That the State Appellate Defender's Office, an Attorney at Law, whose business address is Third Floor, North Tower,

1200 Sixth Avenue, Detroit, Michigan 48226, be assigned as appelate counsel for said defendant, to assist the Bay County Public Defender's Office in representing Petitioner. This Order to be effective as of August 10, 1976.

John X. Theiler /s/
JOHN X THEILER,
CIRCUIT JUDGE

Dated this 25th day of August, 1976.

COURT OF APPEALS ORDER DISMISSING PETITION FOR WRIT OF HABEAS CORPUS

AT A SESSION OF THE COURT OF APPEALS OF THE STATE OF MICHIGAN, Held at the Court of Appeals in the City of Detroit, on the 18th day of November in the year of our Lord one thousand nine hundred and seventy-six.

Present the Honorable

Vincent J. Brennan,
Presiding Judge,

S. Jerome Bronson,
William R. Beasley,
Judges.

In this cause a complaint for habeas corpus, motion for an order to show cause, a motion for stay of extradition and motion for bond pending appeal are filed by Harold William Doran, and nothing in opposition thereto having been filed, and due consideration of the respective matters having been had by the Court,

IT IS ORDERED that the motion for an order to show

cause be and the same is hereby DENIED, for lack of merit in the grounds presented.

IT IS FURTHER ORDERED that the complaint for habeas corpus be and the same is hereby DISMISSED.

IT IS FURTHER ORDERED that motion for stay of extradition and the motion for bond pending appeal be, and the same are hereby DENIED.

STATE OF MICHIGAN—ss.

I, Ronald L. Dzierbicki, Clerk of the Court of Appeals of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court of Appeals at Lansing, this 22nd day of November, in the year of our Lord one thousand nine hundred and seventy-six.

(s) Ronald L. Dzierbicki
Clerk

SUPREME COURT ORDER GRANTING APPLICATION FOR LEAVE TO APPEAL

(Filed November 3, 1976)

At A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the City of Lansing, on the 1st day of November in the year of our Lord one thousand nine hundred and seventy-six.

Present the Honorable

Thomas Giles Kavanagh,
Chief Justice,

G. Mennen Williams,
Charles L. Levin,
Mary S. Coleman,
John W. Fitzgerald,
Lawrence B. Lindemer,
James L. Ryan,
Associate Justices.

On order of the Court, the delayed application for leave to appeal, motion for immediate consideration, motion for stay of extradition, and motion for bond are considered.

The motion for immediate consideration is hereby GRANTED. The application for leave to appeal is hereby GRANTED as to the issues raised in defendant's application. The motions for stay of extradition and bond are hereby DENIED.

STATE OF MICHIGAN—ss.

I, Harold Hoag, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it

is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 3rd day of November in the year of our Lord one thousand nine hundred and seventy-six.

(s) Corbin R. Davis,
Deputy Clerk

MICHIGAN SUPREME COURT OPINION

IN THE MATTER OF DORAN (PEOPLE v DORAN)

Docket No. 58698. Argued June 9, 1977 (Calendar No. 18).—Decided October 4, 1977.

Harold W. Doran is detained in the Bay County jail on a governor's warrant for extradition to Arizona on alternative charges of theft of a motor vehicle or theft by embezzlement. He brought an action for *habeas corpus* in the Bay Circuit Court, John X. Theiler, J., to contest his detention, and the action was dismissed. The Court of Appeals, V.J. Brennan, P.J., and Bronson and Beasley, JJ., denied his application for leave to appeal (Docket No. 28507), and dismissed his subsequent complaint for *habeas corpus* in the Court of Appeals (Docket No. 30516). Doran appeals, asserting that he may not be extradited, because the governor's warrant for his extradition was issued more than 90 days after his arrest, and that the warrant and affidavits supporting the requisition by the Governor of Arizona are insufficient because they do not show probable cause. *Held:*

1. The Uniform Criminal Extradition Act limits the period of confinement following arrest as a fugitive to a maximum of 90 days. The purpose of this limit is to prevent unreasonably lengthy periods of confinement pending consummation of extradition proceedings by the demanding state, but the act was not intended to restrict the period within which the Governor may issue his rendition warrant. Although a fugitive may be entitled to discharge from confinement or bail after 90 days, he may nevertheless be re-arrested and extradited pursuant to a valid governor's warrant issued subsequent to the 90-day period.

2. The State of Michigan may not arrest, detain, and render to the demanding state a person accused of crime unless the

demanding state submits an indictment or judicial determination of probable cause, or where there has been none, adequate factual affidavits reflecting probable cause. The affidavits should be in such form as would support a finding of probable cause for the issuance of an arrest or search warrant under the Fourth Amendment decisions of the Supreme Court of the United States. The extradition statute requires that the indictment, information or affidavit made before a magistrate of the demanding state must substantially charge the person demanded with having committed a crime under the law of that state. Where there has been no indictment or judicial determination of probable cause in the demanding state, a requirement that the demanding state's affidavit set forth facts which support a determination of probable cause safeguards citizens and other persons found in the asylum state against abuse of the extradition process. The holding in this case does not apply to an indictment, but only to an affidavit.

3. In the case at bar, there is no indictment or document reflecting a prior judicial determination of probable cause. The Arizona complaint and arrest warrant are both phrased in conclusory language which simply mirrors the language of the Arizona statutes, and their supporting affidavits fail to set out facts which could justify a Fourth Amendment finding of probable cause to charge a crime. The defect has not been cured. Mr. Doran has been in custody since December 18, 1975.

The judgment of the trial court is reversed and the release of the prisoner is ordered forthwith.

REFERENCES FOR POINTS IN HEADNOTES

[1]
31 Am Jur 2d, Extradition §§ 60-63.

[2, 4, 5]
31 Am Jur 2d, Extradition § 53.

[3]
31 Am Jur 2d, Extradition §§ 36, 39.

1. EXTRADITION—GOVERNOR'S WARRANT—CONFINEMENT—90-DAY LIMIT—UNIFORM CRIMINAL EXTRADITION ACT.

A fugitive is entitled under the Uniform Criminal Extradition Act to be discharged from confinement or bail 90 days after his arrest as a fugitive if no valid governor's warrant has issued; he may, nevertheless, be re-arrested and extradited pursuant to a valid governor's warrant issued subsequent to the 90-day period (MCL 780.14, 780.16; MSA 28.1285[14], 28.1285[16]).

2. EXTRADITION—PROBABLE CAUSE—GOVERNOR'S REQUISITION—AFFIDAVIT.

A governor's requisition for the extradition of a fugitive must be supported by a showing of probable cause; absent a grand jury indictment or a judicial determination of probable cause, the affidavit accompanying the governor's requisition should contain more than conclusory statements and should be in a form which would support an arrest or search warrant under the Fourth Amendment decisions of the Supreme Court of the United States (US Const, Am IV).

3. EXTRADITION—GOVERNOR'S REQUISITION—AFFIDAVIT—PROBABLE CAUSE.

The Uniform Criminal Extradition Act requires that the indictment, information or affidavit made before a magistrate of the demanding state must substantially charge the person demanded with having committed a crime under the law of that state (MCL 780.3; MSA 28.1285[3]).

4. EXTRADITION—INDICTMENT—PROBABLE CAUSE.

The State of Michigan may not arrest, detain, and render to the demanding state a person accused of a crime unless the demanding state submits an indictment or judicial determination

of probable cause, or where there has been none, adequate factual affidavits reflecting probable cause.

5. EXTRADITION—GOVERNOR'S REQUISITION—PROBABLE CAUSE.

An Arizona complaint and arrest warrant which are phrased in conclusory language which simply mirrors the language of the Arizona statutes, and supporting affidavits which fail to set out facts which could justify a Fourth Amendment finding of probable cause to charge a crime are not sufficient ground for extradition of a fugitive to Arizona.

Eugene C. Penzien, Prosecuting Attorney, for the people.

State Appellate Defender Office (by *Kathleen M. Cummins*) for Harold W. Doran.

BLAIR MOODY, JR., J. On December 18, 1975, defendant was arrested in Bay City, Michigan, and charged with receiving and concealing stolen property. MCLA 750.535; MSA 28.803. The charge arose out of defendant's possession of a truck in which he had driven to Michigan from Arizona.

The Bay City Police immediately notified the authorities in Maricopa County (Phoenix), Arizona. On January 7, 1976, the Arizona authorities issued a warrant for defendant's arrest charging theft of a motor vehicle or, in the alternative, theft by embezzlement. ARS 13-672(A), 13-1645, 13-661—13-663, 13-671(A); ARS 13-682, 13-688.

On January 12, 1976, defendant was arraigned in Michigan as a fugitive. The Bay City charge was eventually dismissed. However, the time of defendant's confinement as a fugitive was extended by the Bay County magistrate to allow additional time for his arrest to be made under a warrant of the Governor of Michigan upon a requisition of Arizona's Governor.

The Uniform Criminal Extradition Act, of which both Michigan and Arizona are signatories, MCLA 780.1-MCLA 780.31; MSA 28.1285(1)-28.1285(31); ARS 13-1301—ARS 13-1328, limits the period of confinement following arrest as a fugitive to 30 days with a permissive extension period of 60 days. MCLA 780.14, 780.16; MSA 28.1285(14), 28.1285(16).

On February 11, 1976, Arizona issued a requisition for extradition. The requisition was accompanied by the original complaint and warrant, plus two supporting affidavits. On March 22, 1976, a governor's warrant was issued. Defendant was arraigned thereon on March 29, 1976, some 102 days after his arrest on the Bay County charge, but well within 90 days after the issuance of the Arizona warrant on January 7, 1976, and defendant's arraignment on the fugitive warrant on January 12, 1976.

The defendant twice petitioned the arraigning court for a writ of *habeas corpus* attacking the validity of the governor's warrant on the grounds that it was not issued in conformity with the Uniform Criminal Extradition Act. That court denied both writs. The Court of Appeals denied both defendant's application for leave to appeal the first *habeas corpus* petition and defendant's original *habeas corpus* petition subsequently filed in the Court of Appeals. This court granted leave to appeal on November 1, 1976. 397 Mich 886 (1976).

I

Defendant initially maintains that he must be discharged because the governor's warrant issued more than 90 days after his original arrest. Defendant claims that while he was nominally arrested on December 18, 1975, on the Michigan charge of receiving and concealing stolen property, that arrest was a pretext. In actuality, defendant contends he was held as a

fugitive. Therefore, he is entitled to be discharged since more than 90 days elapsed after his original arrest before the governor's warrant issued on March 22, 1976.

We do not agree. Even if the defendant is correct in his factual premise that the Michigan charge was a pretext and he was entitled to be released after 90 days, he is still subject to extradition.

There is ample authority for the proposition that although a fugitive is entitled to be discharged from confinement or bail upon expiration of the 90-day period, he or she may, nevertheless, be extradited pursuant to a valid governor's warrant issued subsequent to the expiration of the 90-day period. *People ex rel Green v Nenna*, 53 Misc 2d 525; 279 NYS2d 324 (1965); *aff'd* 24 AD2d 936; 264 NYS2d 211 (1965), *aff'd* 17 NY2d 815; 271 NYS2d 267; 218 NE2d 311 (1966); *Miller v Warden, Baltimore City Jail*, 14 Md App 377; 287 A2d 57 (1972).

In *People ex rel Gummow v Larson*, 35 Ill 2d 280, 282; 220 NE2d 165, 167 (1966), the court reasoned thus:

> "The purpose of these sections of the extradition law is to prevent unreasonably lengthy periods of confinement of fugitives pending consummation of extradition proceedings by the demanding State. [Citations omitted.] There is, however, no indication of any legislative intent to restrict the period within which the Governor * * * may issue his rendition warrant to the period within which the court which issues the fugitive warrant may commit the accused or require him to give bond."

Therefore, even if defendant was entitled to be released from the confinement which followed his original arrest, it

is clear that he could be rearrested on the strength of the subsequent governor's warrant.

II

Defendant next maintains that he cannot be extradited where the demanding state's warrant and affidavits supporting the requisition for the Michigan governor's warrant do not reflect an adequate showing of probable cause.

We agree. In *Kirkland v Preston*, 128 US App DC 148, 152, 154-155; 385 F2d 670, 674, 676-677 (1967), the United States Court of Appeals for the District of Columbia held that a governor's requisition must be supported by a showing of probable cause. Absent a grand jury indictment or a judicial determination of probable cause, the affidavit accompanying the governor's requisition should contain more than conclusory statements. The affidavit should be in such form as would support a finding of probable cause for the issuance of an arrest or search warrant under the Fourth Amendment decisions of the United States Supreme Court.

In the case at bar, there is no indictment or document reflecting a prior judicial determination of probable cause. The Arizona complaint[1] and arrest warrant[2] a[illegible]n phrased in

---

[1]

ARIZONA COMPLAINT

EXHIBIT A

East Phoenix I Precinct, Maricopa County,
State of Arizona

STATE OF ARIZONA,
Plaintiff,
v.

HAROLD WILLIAM DORAN aka
TED FOSTER,
Defendant(s).

(FELONY)

THEFT OF MOTOR VEHICLE
OR IN THE ALTERNATIVE:
THEFT BY EMBEZZLEMENT

The complainant herein personally appears and, being duly sworn, complains (on information and belief) against

HAROLD WILLIAM DORAN aka TED FOSTER

charging that in EAST PHOENIX I Precinct, Maricopa County, Arizona: on or about the 18th day of DECEMBER, 1975, HAROLD WILLIAM DORAN aka TED FOSTER took from WAYNE W. KAHLER a motor vehicle described as follows, to-wit: 1973 FORD PICKUP, ½ TON, F100, 1975 California License Number 188MGL, VIN 10GCQ67368, with the intent to permanently deprive WAYNE W. KAHLER of such motor vehicle, all in violation of ARS, Sec. 13-672 (A) & (B), as amended 1975 and 13-1645.

OR IN THE ALTERNATIVE: THEFT BY EMBEZZLEMENT

That in EAST PHOENIX I Precinct, Maricopa County, Arizona: on or about the 18th day of DECEMBER, 1975, HAROLD WILLIAM DORAN aka TED FOSTER committed theft by embezzling from WAYNE W. KAHLER property, to-wit: One (1) 1973 FORD ½ TON PICKUP, F100, VIN 10GCQ67368, 1975 California License Number 188MGL, of the value of over $100.00, all in violation of ARS, Sec. 13-681, 13-682, as amended 1972, and 13-688, 13-671, 13-661, 13-662, 13-663.

(s) Richard Bishop
Complainant C/L

Subscribed and sworn to before me on 1-7-76.

(s) Mary Jo Dixman
Title, J.P.

It is requested that a (X) Warrant, ( ) summons be issued.

conclusory language which simply mirrors the language of the pertinent Arizona statutes. More importantly, the two

It is, is not requested that Defendant appear for fingerprints and photograph.

Norval Jesperson,
Deputy County Attorney

[2]

ARIZONA WARRANT FOR ARREST

EXHIBIT B

East Phx. No. 1 Precinct, Maricopa County,
State of Arizona

THE STATE OF ARIZONA,
Plaintiff,

vs.

HAROLD WILLIAM DORAN aka
TED FOSTER
Defendant(s).

TO ALL PEACE OFFICERS OF THE STATE OF ARIZONA:

A complaint has been filed in this court against HAROLD WILLIAM DORAN aka TED FOSTER charging that in East No. I Precinct, Maricopa County, Arizona, on or about the 18th day of Dec., 1975, the crime of Felony, to-wit: THEFT OF MOTOR VEHICLE OR IN THE ALTERNATIVE: THEFT BY EMBEZZLEMENT, has been committed.

I have found reasonable cause to believe that such offense(s) were committed and that the accused committed them, and reason to believe that the accused will not appear in response to a summons, or that a warrant is otherwise appropriate.

YOU ARE THEREFORE COMMANDED to arrest the accused and bring him before this court to answer the charges. If this court is unavailable, or if the arrest is made in another county, you shall take him before the nearest or most accessible magistrate. You may release him if he posts a secured appearance bond in the amount of ..... dollars ($).

(s) Mary Jo Dixman
Justice of the Peace

(Date) Jan. 7, 1976.

supporting affidavits fail to set out facts which could justify a Fourth Amendment finding of probable cause for charging defendant with a crime.

The complaining police officer's initial affidavit[3] in support

EXHIBIT D

IN RE: EXTRADITION OF
HAROLD WILLIAM DORAN aka TED FOSTER

STATE OF ARIZONA
ss.
COUNTY OF MARICOPA

Thomas C. Bradley, No. 456, being duly sworn does depose and say that he is the Officer in Criminal No. 9204 versus Harold William Doran aka Ted Foster; that he has been shown a photograph dated 12/18/75, marked Exhibit "D" by reference attached and made a part hereof; that the person photographed is the same person who was charged with the crime of Theft of Motor Vehicle, OR IN THE ALTERNATIVE: Theft by Embezzlement, a felony, within the jurisdiction of EAST PHOENIX I Justice Court Precinct, County of Maricopa, as charged in the above-numbered cause.

FURTHER deponeth sayeth not.

Dated this 3rd day of February, 1976.

(s) Thomas C. Bradley
Thomas C. Bradley No. 456

Subscribed and sworn to by Thomas C. Bradley, before Beverly R. Parisi, a Notary Public, this 3rd day of February, 1976.

(s) Beverly R. Parisi
Notary Public
My Commission Expires:
March 11, 1977
[Photo attached]

of the arrest warrant is factually void:

---

[3]

The second affidavit involved an identification of a photograph of the defendant:

"EXHIBIT C

"County of Maricopa, State of Arizona

"The undersigned hereby declares:

"That he is currently employed as a peace officer for the City of Phoenix Police Department, Phoenix, Arizona.

"That, pursuant to his employment he has been assigned to investigate allegations the HAROLD WILLIAM DORAN aka TED FOSTER did violate Section(s) § 13-672(A)(B) and 13-1645.

"That, pursuant to said assignment, your declarant:

"1. Has contacted persons having knowledge of said offense and has prepared written reports and statements; and

"2. Has received and read written reports and statements prepared by others, known by your declarant to be law enforcement officers;

"All of which are included in the report consisting of 9 pages, which is presently an official record of this Department.

"That each of these documents is presently an official record of a law enforcement agency.

"WHEREFORE, your declarant prays that a warrant issue for the herein-above-named defendant, that he be dealt with according to law.

"I declare under penalty of perjury that the foregoing is true and correct.

"Executed on this 3rd day of February, 1976, in Maricopa County.

"(s) Thomas C. Bradley
Declarant
Thomas Bradley No. 456
"City of Phoenix Police Dept.,
Phx., Az.
Address of Law Enforcement
Agency

"Subscribed and sworn to me this 3rd day of February, 1976.

"(s) Beverly R. Parisi
Notary Public
My Commission Expires:
March 11, 1977"

Kirkland v Preston, supra, discussed at length the requirements for Federal rendition. The Federal statute requires "an indictment found or an affidavit made before a magistrate * * *, charging the person demanded with having committed treason, felony, or other crime". 18 USC 3182.

The Michigan statute, based on the Uniform Criminal Extradition Act, *supra,* provides for the furnishing of "certified copies of the indictment returned, or information and affidavit filed, or of the complaint made to the judge or magistrate, and the warrant issued thereupon, stating the offense with which the accused is charged". Significantly the statute further provides that the "indictment, information, or affidavit made before the magistrate must *substantially charge* the person demanded with having committed a crime under the law of that state". MCLA 780.3; MSA 28.1285(3). (Emphasis added.)

The police officer's affidavit in *Kirkland* read, in its pertinent part, as follows:

"* * * [O]n the 23rd day of July A.D., 1965, in the County and District aforesaid [Dade County] on Oliver Lee Kirkland & Elizabeth Maria Smith DID THEN AND THERE: unlawfully, wilfully, maliciously and feloniously set fire to and burn or cause to be burned a certain building, to wit: The Hut Bar, located at 2280 S. W. 32nd Avenue, City of Miami, Dade County, Florida, a further and more particular description of said bar being to the affiant unknown, the said bar being the property of one Fredrich Ritter." *Kirkland, supra,* 150; 385 F2d 672.

The *Kirkland* court found the warrant factually deficient and stated its holding thus:

"We hold that, for purposes of extradition, the section 3182 'affidavit' does not succeed in 'charging' a crime unless it sets out facts which justify a Fourth Amendment finding of probable cause."

The *Kirkland* result is also consistent with the Uniform Act's requirement that the indictment, information or affidavit "substantially charge" the person demanded with having committed a crime under the laws of the demanding state.

Judge J. Skelly Wright speaking for the court in *Kirkland* eloquently set forth at length its rationale for refusing extradition on the basis of an insufficient affidavit:

"There is no reason why the Fourth Amendment, which governs arrests, should not govern extradition arrests. Under its familiar doctrine arrests must be preceded by a finding of probable cause. When an extradition demand is accompainied by an indictment, that document embodies a grand jury's judgment that constitutional probable cause exists. But when the extradition papers rely on a mere affidavit, even where supported by a warrant

of arrest, there is no assurance of probable cause unless it is spelled out in the affidavit itself. Thus Fourth Amendment considerations require that before a person can be extradited on a Section 3182 affidavit the authorities in the asylum state must be satisfied that the affidavit shows probable cause.

• • •

"The law appreciates the hardship which extradition can involve: not only the suspension of one's liberty, but his deportation from the state in which he lives into another jurisdiction which may be hundreds of miles from his home. The law accordingly surrounds the accused with considerable procedural protection to stave off wrongful rendition. It is consistent with this concern for the accused's just treatment to recognize his right to require official confirmation of probable cause in the asylum state before extradition. This right to probable cause confirmation seems especially appropriate in view of the fact that the accused will have no access to an evidentiary preliminary hearing on probable cause until he finally arrives in the accusing jurisdiction.

"In addition, the interests of the asylum state are advanced by its own probable cause determination. For it would be highhanded to compel that jurisdiction to lend its coercive authority, and the processes of its law, against even its own citizens in aid of an enterprise the key details of which remain in the dark. If, as here, it turns out that the prosecution against the fugitive is unfounded, the asylum state will have expended its resources and given the legitimizing stamp of its judiciary to a cause which is at best futile, at worst arbitrary.

"Recognizing a probable cause requirement in Section 3182, moreover, conflicts with no compelling interests

elsewhere in the legal system. If the demanding state does have probable cause data, it will be no real inconvenience to record this evidence in the extradition papers. Documenting probable cause in an affidavit is what the policeman in many jurisdictions, including the District of Columbia, must do if he is to secure an ordinary warrant for an arrest or search. And governors, or *habeas corpus* judges, will hardly be significantly burdened by having to study written submissions for probable cause in extradition cases.

"From all these considerations the court draws the conclusion that the terms of 18 USC 3182 are not met unless the affidavit indicates to the asylum state executive that there is probable cause for believing the accused guilty and that *habeas corpus* is the appropriate remedy to test the validity of his judgment. Since the Florida Section 3182 affidavit was insufficient and this defect was not cured in the time provided by the court, release of the prisoners was mandatory." (Footnotes omitted.) *Kirkland, supra,* 154-155; 385 F2d 676-677.

The *Kirkland v Preston* view that the Fourth Amendment applies to extradition warrants has been adopted by the United States Courts of Appeals for the First and Third Circuits. See *Ierardi v Gunter,* 528 F2d 929, 930-931 (CA 1, 1976) (where the court concluded that *Gerstein v Pugh,* 420 US 103; 95 S Ct 854; 43 L Ed 2d 54 [1975], "requires a judicial determination of probable cause as a prerequisite to interstate extradition".); and *United States ex rel Grano v Anderson,* 446 F2d 272 (CA 3, 1971).

The *Kirkland* holding has also been adopted by the Supreme Courts of Colorado and Nevada, a New York intermediate appellate court and Connecticut trial court. See *United States ex rel Maybery v Yeager,* 321 F Supp 199, 211 (D NJ, 1971);

Pippin v Leach, 188 Colo 385; 534 P2d 1193 (1975) (refusing to extradite to Michigan because the affidavit, "replete with conclusions and bald allegations of criminal conduct, without supporting facts", failed to "set forth some of the underlying circumstances surrounding the crime charged, as well as an adequate identification of the source or sources of the information set forth in the affidavit".); *Sheriff v Thompson,* 85 Nev 211; 452 P2d 911 (1969); *People ex rel Cooper v Lombard,* 45 AD2d 928; 357 NYS2d 323 (New York Supreme Court, Appellate Division, Fourth Department, 1974) ("the asylum State has a vital interest in the liberty of its citizens and other inhabitants, and since it is only a slight burden on a demanding State to show probable cause for the issuance of a warrant of arrest * * * we join the Second Department in adopting the holding of *Kirkland v Preston.*"); *Brode v Power,* 31 Conn Sup 411; 332 A2d 376 (1974).[4]

In *Williams v Wayne County Sheriff,* 395 Mich 204, 238; 235 NW2d 552 (1975), we adverted to but did not decide the instant question. An equally divided Court affirmed the denial of a petition for writ of *habeas corpus* sought by a Michigan resident resisting extradition. Three Justices of this Court

---

[4]

The Supreme Courts of Illinois, Indiana and South Dakota have rejected the *Kirkland v Preston* view on the ground that the asylum state should not inquire into the regularity of the papers issued by the demanding state. It appears that there are other cases going both ways and, no doubt, there are other rationales.

See People ex rel Kubala v Woods, 52 Ill 2d 48; 284 NE2d 286, 290 (1972) (extraditing to Michigan on a conclusory affidavit; there were factual affidavits but they were made before a notary public and not a magistrate and, therefore, said the court, "will not support the issuance of the rendition warrant"; the court recognized that "it is highly desirable that the affidavit charging a crime in an extradition proceeding recite sufficient facts to show probable cause"); *Bailey v State,* 260 Ind 448, 452; 296 NE2d 422, 425 (1973); *Wellington v State,* ..... SD .....; 238 NW2d 499, 503 (1976).

stated that the courts of this state will not look behind the face of an *indictment.* Three Justices stated that *Kirkland v Preston* "held that a requisition affidavit cannot constitutionally support a rendition arrest unless that affidavit sets out facts which justify a Fourth Amendment finding of probable cause" and would have allowed plaintiff to introduce proofs tending to show that the indictment was a forgery.

The court in *Kirkland v Preston,* distinguishing between an indictment and an affidavit, indicated that its holding would not extend to an indictment. Our holding in the instant case does not apply to an indictment. Like the court in *Kirkland,* our holding only applies to an *affidavit.*

In this state, although the statute provides that an arrest warrant shall issue "[i]f it appears fom such examination" that an offense has in fact been committed, the practice has not been to conduct an examination to establish probable cause. *People v Burrill,* 391 Mich 124, 129; 214 NW2d 823 (1974). MCLA 766.3; MSA 28.921. Here, however in all felony and some misdemeanor cases the accused is entitled to a prompt preliminary examination. It is not clear whether there was an independent judicial determination of probable cause made by the Arizona magistrate before issuance of the governor's requisition.

However, the question presented by this case is broader than whether the Federal or state statutes provide for a showing of probable cause. The Fourth Amendment permits an arrest only on probable cause. Here there has been no showing of probable cause, only conclusory statements in an affidavit. In the light of the Michigan practice of issuing arrest warrants without requiring a showing of probable cause, there is no reason to assume that the Arizona affidavit was made upon a showing, not of record, of probable cause.

While the invalidity of an arrest warrant does not affect the jurisdiction of a court to try the charge for which the offender was arrested, evidence seized incident to an arrest pursuant to an invalid arrest warrant will be suppressed unless the arresting officer himself had factual information constituting probable cause for arrest. *People v Burrill, supra,* 132-136. Here, the Michigan authorities have insufficient factual information constituting probable cause to detain or render the defendant on the Arizona charge.

To be sure, "[t]he guilt or innocence of the accused as to the crime of which he is charged may not be inquired into by the governor or in any proceeding after the demand for extradition". MCLA 780.19; MSA 28.1285(19). However, this statute must be construed consistently with the Fourth Amendment preclusion of arrest and detention without probable cause. It is not suggested that the Michigan courts inquire into the underlying facts. It is determined rather that Michigan may not arrest, detain and render to the demanding state a person accused of a crime unless that state submits an indictment or a judicial determination of probable cause or adequate factual affidavit(s) reflecting probable cause.

Where there has been no indictment or judicial determination of probable cause in the demanding state, a requirement that the demanding state's affidavit set forth facts which support a determination of probable cause safeguards citizens and other persons found in the asylum state against abuse of the extradition process.

The Arizona warrant and supporting affidavit(s) are obviously insufficient and this defect has not been cured. The

trial court is reversed and the release of the prisoner (defendant) is ordered forthwith.[5]

KAVANAGH, C.J., and WILLIAMS, LEVIN, COLEMAN, FITZGERALD, and RYAN, JJ., concurred with BLAIR MOODY, JR., J.

---

[5]

In *Ierardi, supra,* the First Circuit granted *habeas corpus* relief and dismissed the prisoner from the custody of the governor's warrant. The federal proceedings were instituted after the prisoner had failed to obtain relief from the Supreme Judicial Court of Massachusetts. The First Circuit went further than the District of Columbia Circuit by requiring a judicial determination of probable cause.

In *Grano supra,* the Third Circuit proceedings also were instituted after the prisoner had exhausted his state remedies. The district court allowed the demanding state to submit supplemental affidavits and on that basis found probable cause. The Third Circuit affirmed that finding, one judge dissenting on the ground that the governor of the demanding state should reconsider his requisition on the supplemented record before the asylum state acts on his otherwise deficient demand.

In *Kirkland v Preston, supra,* the District of Columbia Circuit released the prisoners after the Florida authorities failed to cure the defective affidavit.

The defendant in this case has been in custody since December 18, 1975; we believe it appropriate that he be released.

MICHIGAN SUPREME COURT FINAL PROCESS

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room in the City of Lansing, on the 4th day of October in the year of our Lord one thousand nine hundred and seventy-seven.

Present the Honorable

THOMAS GILES KAVANAGH,
Chief Justice,

G. MENNEN WILLIAMS,
CHARLES L. LEVIN,
MARY S. COLEMAN,
JOHN W. FITZGERALD,
JAMES L. RYAN,
BLAIR MOODY, JR.,
Associate Justices

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v HAROLD WILLIAM DORAN, Defendant-Appellant.	58698

This cause having been brought to this Court by appeal from the decision of the Court of Appeals and having been argued by counsel and due deliberation had thereon by the Court, IT IS HEREBY ORDERED that the judgments of the Court of Appeals and the Circuit Court for the County of Bay are REVERSED and defendant is ordered RELEASED from custody forthwith. This final process is entered and issued this date pursuant to GCR 1963, 866.

STATE OF MICHIGAN—ss.

I, Harold Hoag, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 4th day of October in the year of our Lord one thousand nine hundred and seventy-seven.

Corbin R. Davis /s/
Deputy Clerk

STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN, **Plaintiff-Appellee,** **v** **HAROLD W. DORAN,** **Defendant-Appellant.**	**Supreme Court No. 58698** **Court of Appeals Nos. 28507 and 30516** **Lower Court No. 76-207-T**

APPLICATION FOR REHEARING

Now comes the People of the State of Michigan, Plaintiff-Appellee herein, through its attorneys, FRANK J. KELLEY, Attorney General for the State of Michigan, Robert A. Derengoski, Solicitor General, and John A. Wilson, Assistant Attorney General, and pursuant to 1963 GCR 864.4, makes application to this Court for rehearing, stating in support thereof the following:

1. On October 4, 1977 this Honorable Court issued an opinion in the matter of *People of the State of Michigan* v *Harold W. Doran*, Michigan Supreme Court Docket No. 58698.

2. The decision held that in extradition cases law enforcement officials in the State of Michigan cannot arrest, or return an individual to the demanding state unless the demanding state submits an affidavit which, under the Fourth Amendment to the United States Constitution, shows facts which establish probable cause to believe that the individual committed a crime under the laws of the demanding state.

3. The court's decision failed to consider other authorities, not mentioned in the Court's opinion, which are contrary to

the holding of the Court. *In re Otis Golden*, 65 Cal App 3d 789, ... Cal Rptr ..... (1977) appeal dismissed and *cert den sub nom; Golden* v *California*, ... US ....., ... SCt ....., ... LEd 2d ....., 46 USLW 3185, 22 Crim L Rptr 4014 (Oct 4, 1977); *DeGenna* v *Grasso*, 413 F Supp 427 (D Conn, 1976) *aff'd* 426 US 913; 96 SCt 2617; 49 LEd 2d 368 (1976); *Garrison* v *Smith*, 413 F Supp 747 (ND Miss, 1976).

4. The opinion did not discuss the potential conflicts between its holding and the mandate of US Const, art 4, § 2, clause 2.

Respectfully submitted,

FRANK J. KELLEY
Attorney General

Robert A. Derengoski
Solicitor General

By: JOHN A. WILSON /s/
John A. Wilson (P22407)
Assistant Attorney General

Attorneys for Plaintiff-Appellee
Criminal Division
Office of Attorney General
The Law Building
525 W. Ottawa Street
Lansing, MI 48913
(517) 373-1120

Dated: October 24, 1977

STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN, **Plaintiff-Appellee.** **v** **HAROLD W. DORAN,** **Defendant-Appellant.**	**Supreme Court No. 58698** **Court of Appeals Nos. 28507 and 30516** **Lower Court No. 76-207-T**

AFFIDAVIT IN SUPPORT OF MOTION FOR REHEARING

John A. Wilson, being first duly sworn, deposes and says that he has read the foregoing and it is true and correct to the best of his knowledge and belief.

JOHN A. WILSON /s/
Assistant Attorney General

Attorneys for Plaintiff-Appellee
Criminal Division
Office of Attorney General
The Law Building
525 W. Ottawa Street
Lansing, MI 48913
(517) 373-1120

Subscribed and sworn to before me
this 24th day of October, 1977.

LINDA DROSTE /s/
Linda Droste, Notary Public
Ingham County, Michigan
My Commission Expires 2-13-78

STATE OF MICHIGAN
IN THE SUPREME COURT

(Court of Appeals Nos. 28507 and 30516; Lower Court No. 76-207-T)

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, vs. HAROLD DORAN, Defendant-Appellant.	Supreme Court No. 58698

OBJECTIONS TO APPLICATION FOR REHEARING

NOW COMES the above defendant-appellant by his attorneys, the STATE APPELLATE DEFENDER OFFICE, by KATHLEEN M. CUMMINS, and objects to the application for rehearing filed by the Attorney General in this case, and states in support of his objections the following:

1. On October 4, 1977, this Honorable Court issued in this cause an opinion reversing the trial court and ordering the immediate discharge of Harold Doran, an order which was carried out the following day. *People* v *Doran,* ..... Mich ..... No. 58698 filed October 4, 1977.

2. The above opinion held that where extradition of an accused fugitive (based on an untried charge) is sought ". . . It is determined . . . that Michigan may not arrest, detain and render to the demanding state a person accused of a crime unless that state submits an indictment or a judicial determination of probable cause or adequate factual affidavit(s) reflecting probable cause.

Where there has been no indictment or judicial determination of probable cause in the demanding state, a requirement that the demanding state's affidavit set forth facts which support a determination of probable cause safeguards citizens and other persons found in the asylum state against abuse of the extradition process."

3. On October 24, 1977, the Michigan Attorney General's office filed an application for rehearing of the above decision. The Bay County prosecutor's office, an original party to this action throughout its extensive history, did not join in the application for rehearing.

4. Appellant contends that rehearing should be denied for the following reasons:

A. The Attorney General should not be permitted to intervene, at this late juncture, in an appeal in which he has made no previous effort to participate. Appellant is aware that Michigan statute, MCLA 14.101; MSA 327.41 authorizes the Attorney General to intervene "in any action heretofore or hereafter commenced in any court of the state whenever such intervention is necessary in order to protect any right or interest of the state, or of the people of the state."

However, it is clear that the right of the Attorney General to intervene is no greater than that of any other party to the litigation. *Gremore* v *People's Community Hospital Authority*, 8 Mich App 56, 59 (1967). The Attorney General's office failed to participate in this appeal at any stage. In fact, when the Attorney General's office was subpoenaed in one of the habeas corpus hearings held in this matter in Bay County Circuit Court, the assistant attorney general who appeared, moved to quash the subpoena and stated:

> "MR. PADILLA: . . . In addition, Your Honor, we would like to point out to the Court that we are not proper parties to this action. I'm speaking of the verified complaint which is Bay County Circuit Court file number 76-207. We are not proper parties to the complaint. Nowhere does that complaint allege any sort of action, inaction, wrongdoing, duty, or anything. It doesn't mention the Attorney General, other than putting his name on the heading." (p. 58, transcript of hearings held April 8 and 9, 1976 in Bay County Circuit Court)

Obviously, the Attorney General's office had notice of the pendency of this matter since the habeas corpus stage, but deliberately declined involvement.

The Attorney General's office did not oppose either the application for leave to appeal or the petition for writ of habeas corpus. The Attorney General did not oppose Appellant's application for leave to appeal in this Court, did not file a brief and did not appear for oral arguments. An issue on appeal is abandoned if the party does not brief that issue. *Mitcham* v *Detroit*, 355 Mich 182 (1959). Since the Attorney General's right to participate in an appeal is no broader than that of a party, his failure to file a brief constitutes a waiver of that right. See *Anchor Bay Citizens* v *Board of Education*, 55 Mich App 428, 430-431 (1974). This Court should not condone this eleventh hour intervention.

B. Even if this Court should find that the Attorney General's office had standing to move for rehearing, the arguments raised in his application are without merit.

1. The Attorney General contends that this Court's decision failed to consider a number of cases contrary to the position taken in the opinion. The Attorney General intimates

that because these cases were not cited in the *Doran* opinion, they were not considered by this Court, a proposition which is patently absurd. This Court was supplied with ample authority contrary to the position taken in Appellant's brief and in the opinion.

Specifically, the Attorney General alleges that this Court failed to consider three cases: *In Re Otis Golden*, 65 Cal App 3d 789, 135 Cal Rptr 512 (1977); *DeGenna* v *Grasso*, 413 F Supp 427 (D Conn, 1976) and *Garrison* v *Smith*, 413 F Supp 747 (ND Miss, 1976). Even assuming that failure to consider three cases could be a pivotal factor in this Court's decision, the three above cases cannot pretend to attain pivotal stature in the *Doran* case.

Appellant at no time contended that his brief espoused a majority view on whether, to justify rendition, affidavits and complaints supporting a requisition had to reflect a prior judicial determination of probable cause. On the contrary, Appellant was quite careful to point out in his brief that the cases had polarized around this issue (pp 9, 10, Appellant's brief) and urged that the *Kirkland** view was the newer and more intelligent (but not the most widely adopted) standpoint (pp 11-12, Appellant's brief).

In fact, the traditional rationales against requiring probable cause were set out in some detail on pages 10 to 11 of Appellant's brief. *In Re Otis Golden, supra*, is a typical example of the traditional view and its consideration by this Court would have been, as best, cumulative.

DeGenna v *Grasso* would not have been pertinent to the *Doran* case because *DeGenna* involved a completely different issue (whether the asylum state governor, in issuing a rendition warrant, was usurping a judicial function).

**Kirkland* v *Preston*, 385 F2d 670 (CADC, 1967).

Garrison v *Smith*, far from being excluded from this Court's was cited and *paraphrased* in Appellant's brief (pp 10, 11).

2. The Attorney General also maintains that this Court failed to consider United States Supreme Court summary affirmances of the *Golden* and *DeGenna* decisions. *Golden* v *California*, 46 USLW 3185, 22 CLR 4014 (October 4, 1977) (dismissing appeal for want of jurisdiction and denying cert); *Carino* v *Grasso*, 426 US 913, 96 S Ct 2617, 49 L Ed 2d 368 (1976) (affirming). The Attorney General takes the position that these two summary orders reflect United States Supreme Court endorsement of the proposition that a probable cause showing is not a constitutional prerequisite to rendition. This is wrong. The Attorney General quotes, out of context, a portion from a passage in *Mandel* v *Bradley*, ... US ....., 97 S Ct 2238, 2240; 50 L Ed 2d 199, 205 in support of his contention that a summary affirmance means that the United States Supreme Court has adopted the holding and rationale of the Court below. The entire passage reads as follows:

> "[2a, 3] The District Court erred in believing that our affirmances in Salera adopted the reasoning as well as the judgment of the three-judge court in that case and thus required the District Court to conclude that the early filing date is impermissibly burdensome. *Hicks* v *Miranda*, 422 US 332, 45 L Ed 2d 223, 95 S Ct 2281 (1975), held that lower courts are bound by summary actions on the merits by this Court, but we noted that '[a]scertaining the reach and content of summary actions may itself present issues of real substance.' Id., at 345 n 14, 45 L Ed 2d 223, 95 S Ct 2281. *Because a summary affirmance is an affirmance of the judgment only, the rationale of the affirmance may not be gleaned solely from the opinion below.*
>
> 'When we summarily affirm, without opinion . . . we affirm the judgment but not necessarily the reasoning

by which it was reached. An unexplicated summary affirmance settles the issues for the parties, and is not to be read as a renunciation by this Court of doctrines previously announced in our opinions after full argument.' *Fusari* v *Steinberg*, 419 US 379, 391-392, 42 L Ed 2d 521, 95 S Ct 533 (concurring opinion of the Chief Justice.)

"[4] Summary affirmances and dismissals for want of a substantial federal question without doubt reject the specific challenges presented in the statement of jurisdiction and do leave undisturbed the judgment appealed from. They do prevent lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by those actions. After Salera, for example, other courts were not free to conclude that the Pennsylvania provision invalidated was nevertheless constitutional. Summary actions, however, including Salera, should not be understood as breaking new ground but as applying principles established by prior decisions to the particular facts involved.

"Here, the District Court ruled that legally 'Salera decides the issue before us, and as the latest expression of the Supreme Court, we are bound to follow it.' J.S. 12a. The precedential significance of the summary action in Salera, however is to be assessed in the light of all of the facts in that case; and it is immediately apparent that those facts are very different from the facts of this case." 53 L Ed 204-205. (Emphasis added)

This case clearly does not stand for the principle that dismissal of an appeal for want of jurisdiction as in *Golden* by the Supreme Court amounts to a disposition on the merits of the appeal. Even if *Golden* were an affirmance, and if this Court could have considered it (which would have involved some

acrobatics since the summary affirmance was issued the same date as the opinion in *Doran*) such an affirmance clearly upholds only the judgment of the lower court and does not necessarily incorporate the legal reasoning of that court.

If the precedential significance of a summary action is to be assessed in light of all the facts in that case, it is clear that the affirmance in *DeGenna* would have no significance in the *Doran* case. As noted previously, the question presented in *DeGenna* was different and moreover, the requisition in that case was supported by a grand jury indictment, a fact which totally distinguishes that case from *Doran*.

Consequently, it is clear that this Court's failure to cite the above cases in its opinion was not a crucial omission. This Court also failed to cite *Montague* v *Smedley*, 557 P2d 774 (1976), a decision of the Alaska Supreme Court which Appellant's counsel presented to the Court at oral arguments and which, on facts very similar to the case at bar, adopted the *Kirkland* approach. This omission did not prevent this Court from taking a position almost identical to the holding of the Alaska Supreme Court.

WHEREFORE, Appellant respectfully requests that rehearing be denied.

Respectfully submitted,

STATE APPELLATE DEFENDER OFFICE

By: KATHLEEN M. CUMMINS
Assistant Defender

Third Floor, North Tower
1200 6th Avenue
Detroit, Michigan 48226
256-2814

Dated: November 1, 1977

AFFIDAVIT

STATE OF MICHIGAN }
COUNTY OF WAYNE } ss.

KATHLEEN M. CUMMINS, being first duly sworn, deposes and says she has read the foregoing and it is true, to the best of her knowledge and belief.

(s) Kathleen M. Cummins

Subscribed and sworn to before me this 1st day of November, 1977.

(s) Lavenia Appling
Notary Public, Wayne County, Michigan
My commission expires: May 20, 1981

ORDER DENYING REHEARING

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the City of Lansing, on the 29th day of November in the year of our Lord one thousand nine hundred and seventy-seven.

Present the Honorable

THOMAS GILES KAVANAGH,
Chief Justice,

G. MENNEN WILLIAMS,
CHARLES L. LEVIN,
MARY S. COLEMAN,
JOHN W. FITZGERALD,
JAMES L. RYAN,
BLAIR MOODY, JR.,
Associate Justices

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v HAROLD WILLIAM DORAN, Defendant-Appellant.	CoA: 28507 LC: 76-207

In this cause an application for rehearing is considered and is hereby DENIED.

STATE OF MICHIGAN—ss.

I, Harold Hoag, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 29th day of November in the year of our Lord one thousand nine hundred and seventy-seven.

[SEAL]

Corbin R. Davis /s/
Deputy Clerk

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-1202

STATE OF MICHIGAN,

Petitioner-Appellant,

v.

HAROLD W. DORAN,

Respondent-Appellee.

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

STATE APPELLATE DEFENDER OFFICE

By: KATHLEEN M. CUMMINS
Assistant Defender
Attorney for Respondent- Appellee

Third Floor, North Tower
1200 6th Avenue
Detroit, Michigan 48226
Telephone: (313) 256-2814

AMERICAN BRIEF
GRAND

JAMES R. NEUHARD

TABLE OF CONTENTS

INDEX OF AUTHORITIES

INDEX OF AUTHORITIES (CONT'D)

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-1202

STATE OF MICHIGAN,
Petitioner-Appellant,

v.

HAROLD W. DORAN,
Respondent-Appellee.

COUNTERSTATEMENT OF THE QUESTION PRESENTED

THE MICHIGAN SUPREME COURT DID NOT MISCONSTRUE THE FOURTH AMENDMENT, THE EXTRADITION CLAUSE OF THE UNITED STATES CONSTITUTION OR THE PROVISIONS OF THE UNIFORM CRIMINAL EXTRADITION ACT WHEN IT HELD THAT THE SCOPE OF A HABEAS CORPUS CHALLENGE TO EXTRADITION LEGITIMATELY ENCOMPASSES A SCRUTINY BY THE ASYLUM JURISDICTION OF THE CHARGING DOCUMENTS SUPPORTING THE DEMANDING STATE'S REQUISITION TO DETERMINE WHETHER SUCH DOCUMENTS FACIALLY REFLECT PROBABLE CAUSE AND HENCE "SUBSTANTIALLY CHARGE" THE ACCUSED FUGITIVE WITH CRIME.

COUNTERSTATEMENT OF THE CASE

Respondent accepts Petitioner's Statement of the Case, with the following additions:

1. The Michigan Supreme Court ordered the immediate release of Respondent Harold Doran largely because he had been incarcerated without bond pending extradition since December 18, 1975. *People* v *Doran,* 401 Mich 235, 250, fn 5, 258 NW 2d 406 (1977). By the decisional date of *Doran* (October 4, 1977) Respondent, who was being held solely for extradition, had been in custody almost two years. The Arizona charge upon which extradition was sought carries a maximum of five years imprisonment. ARS 13.1645.

2. The Petition for Certiorari was received by Counsel for Respondent on February 23, 1978.

REASONS FOR DENYING THE PETITION FOR CERTIORARI

I. The Decision Below Rests Upon An Adequate And Independent State Ground And Therefore This Court Should Decline Jurisdiction.

The Michigan extradition statute, based on the Uniform Criminal Extradition Act, provides, as a prerequisite to rendition, for the furnishing of "certified copies of the indictment returned, or information and affidavit filed, or of the complaint made to the judge or magistrate, and the warrant issued thereupon, stating the offense with which the accused is charged." The statute further provides that the "indictment, information or affidavit made before the magistrate must *substantially charge* the person demanded with having committed a crime under the law of that state." MCLA 780.3; MSA 28.1285(3). Emphasis supplied.

In *In the Matter of Doran* (*People* v *Doran*), 401 Mich 235, 258 NW 2d 406 (1977), the Michigan Supreme Court held that "Michigan may not arrest, detain and render to the demanding state a person accused of a crime unless that state submits an indictment, a judicial determination of probable cause or adequate factual affidavit(s) reflecting probable cause." *People* v *Doran, supra,* 250.

In so holding, the Michigan Supreme Court was expressly construing the Uniform Act's requirement that the indictment, affidavit or information "substantially charge" the accused fugitive with crime. In effect, the state court was interpreting the "substantially charge" requirement in a manner consistent with the Fourth Amendment to the United States Constitution.

The Uniform Criminal Extradition Act, as enacted in Michigan by MCLA 780.1-780.31; MSA 28.1285(1)-(31), is clearly state legislation. The state court's holding did not

rely entirely on the Fourth Amendment but merely specified the Fourth Amendment implications of the state law's "substantially charge" requirement.

Thus, this Court must consider the applicability of

> " 'the settled rule that where the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, our jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment. *Fox Film Corp.* v *Muller,* 296 US 207, 210, 80 L Ed 158, 159, 56 S Ct 183.' "

Cramp v *Board of Public Instruction,* 368 U.S. 278, 82 S Ct 275, 7 L Ed 2d 285, 288 (1961).

If the state court's ruling is based solely upon Federal grounds or the state court is acting under what it conceives to be the compulsion of the Federal constitution, a separate state ground has not been established. *Department of Mental Hygiene of California* v *Kirchner,* 380 U.S. 194, 85 S Ct 871, 13 L Ed 2d 753, 756-758 (1965). Here, the Michigan Supreme Court relied on a number of Federal decisions, notably *Kirkland* v *Preston,* 128 U.S. App D.C. 148; 385 F 2d 670 (1967). However, the Supreme Court referred to such cases by analogy only, comparing the Federal Court's interpretation of the Fourth Amendment to its own similar interpretation of MCLA 780.3; MSA 28.1285(3). *People* v *Doran, supra,* 401 Mich at 244-247.

The *Doran* opinion also cited a number of state appellate decisions supporting the proposition that an adequate showing of probable cause must precede rendition.

This was not a case where the State and Federal grounds are "so interwoven" that this Court would be unable to conclude that the judgment rests upon an independent interpretation of the state law. *Jankovich* v *Indiana Toll Road Commission,* 379 U.S. 487, 85 S Ct 493, 13 L Ed 2d 439, 443 (1965). Rather, the Michigan Supreme Court was merely

exercising its prerogative as "the final judicial arbiter of the meaning of state statutes" and construing a provision of the Uniform Criminal Extradition Act as enacted in Michigan. See *Gurley* v *Rhoden,* 421 U.S. 200, 207, 95 S Ct 1605, 44 L Ed 2d 110, 117 (1975). In reaching the result in *Doran,* the Michigan Supreme Court was fulfilling what it has historically viewed as its duty to interpret Michigan statutes in such a way as to render them constitutional. See *People* v *Adams,* 389 Mich 222, 229-230; 205 NW 2d 415 (1973); *Michigan Towing Association, Inc.* v *Detroit,* 370 Mich 440, 456; 122 NW 2d 709 (1963).

Thus, Respondent urges that the Michigan Attorney General has failed to meet his burden of demonstrating that the decision in *Doran* is not supported by an adequate, independent state ground.

II. The Michigan Supreme Court, In Deciding A Habeas Corpus Challenge To Extradition, Has A Right To Address Itself To The Question Of Whether The Charging Documents Underlying The Demanding State's Requisition Reflect Sufficient Probable Cause To Justify Rendition Of An Accused Fugitive By Michigan.

The asylum state, and the courts of that state, have the right to protect state citizens and other inhabitants from unreasonable intrusions into their persons or property and from significant unjustified restraint of liberty. Such intrusion, or restraint, must be preceded by a sufficiently detailed demonstration of probable cause to believe that a crime has been committed. This is the mandate of the Fourth Amendment. *Gerstein* v *Pugh,* 420 U.S. 103, 95 S Ct 854, 43 L Ed 2d 54 (1975).

Counterbalanced against the demands of personal liberty is the interest of the several states in an efficient and speedy extradition process whose effect is to eliminate state borders to prevent exploitation of such boundaries as "a shield

for the guilty". *Biddinger* v *Commissioner*, 254 U.S. 128, 132-133, 38 S Ct 41, 62 L Ed 193 (1917). This interest is protected by the Extradition Clause, U.S. Const. Art IV, §2, implemented by 18 USC 3182 and state legislation on extradition. The demands of the Extradition Clause are not necessarily irreconcilable with those of the Fourth Amendment, and, contrary to Petitioner's assertion, the Michigan Supreme Court's application of the Fourth Amendment in *Doran* does not clash with the purpose of the Extradition Clause.

The Extradition Clause, speaking of potential extraditees, refers to "A person *charged* in any State . . . with . . . felony, or other Crime," U.S. Const, Art IV, §2. (Emphasis supplied). 18 USC 3182 provides that to invoke rendition the demanding state must tender to the asylum state "a copy of an indictment found or an affidavit made before a magistrate . . . *charging* the person demanded with . . . crime . . ." (Emphasis supplied). Similarly, MCLA 780.3; MSA 28.1285(3) based on the Uniform Criminal Extradition Act, provides that the "indictment, information or affidavit" tendered by the demanding state "must substantially charge the person demanded with . . . crime."

This Court has repeatedly held that whether charging documents in support of an extradition request "substantially charge" a crime is proper subject of inquiry in a habeas corpus challenge to extradition. *Ex parte Reggel*, 114 U.S. 642, 5 S Ct 1148, 29 L Ed 250 (1885); *Roberts* v *Reilly*, 116 U.S. 80, 6 S Ct 291, 29 L Ed 544 (1885); *Pierce* v *Creecy*, 210 U.S. 387, 28 S Ct 714, 52 L Ed 1113 (1908). However, this inquiry, in order to avoid undue circumstances on the extradition process, has historically been limited to the *face* of the charging documents. *Biddinger* v *Commissioner, supra; Roberts* v *Reilly, supra.*

Petitioner intimates that the *Doran* result entails and condones an inquiry "behind the demanding state's documents in order to consider Federal constitutional claims raised by the fugitive." *Petition for Certiorari*, page 5. This is a misreading of the *Doran* decision.

The Michigan Supreme Court based its holding squarely on *Kirkland* v *Preston*, 128 U.S. App DC 148, 385 F 2d 670 (1967); where the United States Court of Appeals for the District of Columbia held that a governor's requisition must be supported by a showing of probable cause. Absent a grand jury indictment or a judicial determination of probable cause, the affidavit accompanying the demanding state's requisition should contain more than bald, conclusory accusations.

Following *Kirkland's* analysis of similar language in 18 USC 3182, the Michigan Supreme Court found that to require extradition charging documents to reflect probable cause was

> ". . . consistent with the Uniform Act's requirement that the indictment, information or affidavit 'substantially charge' the person demanded with having committed a crime under the laws of the demanding State." *Doran, supra*, 401 Mich at 245.

Contrary to the Attorney General's position, such a result does not subvert the policy underlying cases such as *Pierce* v *Creecy, supra*, namely to ensure that a habeas court does not provide a fugitive charged with crime with asylum by characterizing that charge as insubstantial because of mere technical deficiencies. Rather, the *Kirkland* and *Doran* decisions seek to probe the meaning of "substantiality".

Absent an evidentiary determination preceding or immediately following a serious restraint of liberty or other intrusion, the Fourth Amendment has consistently been interpreted to require, as a prerequisite to such intrusion, suppporting documents which reflect on their face a detailed factual showing of probable cause. *Gerstein* v *Pugh*,

supra; Whitely v *Warden,* 401 U.S. 560, 91 S Ct 1031, 28 L Ed 2d 306 (1971); *Giordenello* v *United States,* 357 U.S. 480, 78 S Ct 1245, 2 L Ed 2d 1503 (1958); *Spinelli* v *United States,* 393 U.S. 410, 89 S Ct 584, 21 L Ed 2d 637 (1969); *Aguilar* v *Texas,* 378 U.S. 108, 84 S Ct 1509, 12 L Ed 2d 723 (1964). The requisite showing entails setting forth "some of the underlying circumstances surrounding the crime charged, as well as an adequate identification of the source or sources of the information set forth in the affidavit." *Pippin* v *Leach,* 188 Colo 385, 534 P 2d 1193 (1975).

Noting the extremely serious restraint posed by an extradition arrest,[1] the Michigan Supreme Court did nothing more revolutionary than require that where an extradition request is supported by affidavits alone, those affidavits must facially reflect probable cause. In so holding, the Supreme Court distinguished the *Doran* case from a situation where the requisition is supported by an indictment, which subsumes a prior evidentiary determination of probable cause. *Doran, supra,* 401 Mich 249. The Supreme Court also considered the fact that in Michigan conventional arrest warrants are often issued without a detailed factual showing of probable cause, contemplating a prompt preliminary hearing on this issue following arrest. The Court speculated that there was no reason to assume that Arizona did not follow a similar procedure.[2] *Doran, supra,* 401 Mich at 249.

[1] The *Doran* decision, 401 Mich at 246 quotes the following passage from *Kirkland*:

> "The law appreciates the hardship which extradition can involve: not only the suspension of one's liberty but his deportation from the state in which he lives into another jurisdiction which may be hundreds of miles from his home. The law accordingly surrounds the accused with considerable procedural protection to stave off wrongful rendition. It is consistent with this concern for the accused's just treatment to recognize his right to require official confirmation of probable cause in the asylum state before extradition."

In holding that absent some indication of a prior judicial determination, affidavits supporting a requisition had to reflect, on their face, factual information constituting probable cause, the Supreme Court carefully avoided extending the habeas corpus inquiry beyond the face of the charging documents:

> "It is not suggested that the Michigan courts inquire into the underlying facts. It is determined rather that Michigan may not arrest, detain and render to the demanding state a person accused of a crime unless that state submits an indictment or a judicial determination of probable cause or adequate factual affidavit(s) reflecting probable cause." *People* v *Doran, supra,* 401 Mich 250.

Such a proposal would not unduly burden the extradition process:

> "... documenting probable cause on the face of an affidavit requires no more than what policemen do on a daily basis to secure arrest or search warrants. This minor imposition is necessary to protect against the very serious consequences of a wrongful extradition." *Wellington* v *State of South Dakota,* 413 F Supp 151, 154 (SD, 1976). See also *Kirkland* v *Preston, supra,* 385 F 2d 676-677.

The Attorney General further maintains that "The record in the proceeding below indicates that a magistrate in

[2] In fact, in Arizona an arrest warrant may issue upon less than probable cause. See *State* v *Lynch,* 107 Ariz 463, 489 P 2d 697 (1971).

the demanding state, Arizona, had determined that under the laws of the State of Arizona there was reasonable cause to believe that respondent committed a crime." *Petition for Certiorari,* page 6. There is simply no basis for this conclusion. Like the charging documents condemned in *Kirkland,* the Arizona complaint and warrant are both phrased in conclusory language which simply mirrors the language of the pertinent provisions of the Arizona criminal code. These documents do not indicate that a judicial determination of probable cause took place. The only "record" of a purported probable cause determination is the strictly "'canned" language of the arrest warrant;

> "I have found reasonable cause to believe that such offense(s) were committed and that the accused committed them, and reason to believe that the accused will not appear in response to a summons, or that a warrant is otherwise appropriate."

underneath which a Justice of the Peace has affixed her signature. This indicates no more than that a Justice of the Peace signed the warrant, which is merely a standardized, fill-in-the-blanks form. No additional circumstances or sources are supplied to flesh out this conclusory finding of "reasonable cause". The State of Michigan is not obligated to extradite on the basis of boilerplate, and the Supreme Court of Michigan was correct in so holding.

CONCLUSION

For these reasons, Respondent respectfully requests that this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

STATE APPELLATE DEFENDER OFFICE

By: KATHLEEN M. CUMMINS
Assistant Defender
Attorney for Respondent- Appellee

Third Floor, North Tower
1200 6th Avenue
Detroit, Michigan 48226
Telephone: (313) 256-2814

Dated: March 14, 1978

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977
No. 77-1202

STATE OF MICHIGAN,

Petitioner,

v.

HAROLD W. DORAN

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF MICHIGAN

BRIEF FOR THE PETITIONER

FRANK J. KELLEY
Attorney General

Robert A. Derengoski
Solicitor General

John A. Wilson
Assistant Attorney General

Jann Ryan Baugh
Assistant Attorney General

525 West Ottawa Street
762 Law Building
Lansing, Michigan 48913
(517) 373-1124

Dated: May 26, 1978

PRINTED BY SPEAKER-HINES AND THOMAS., INC., LANSING, MICHIGAN—1978

TABLE OF CONTENTS

INDEX OF AUTHORITIES

United States Statutes and Constitutional Provisions

State Statutes and Rules

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977
No. 77-1202

STATE OF MICHIGAN,

Petitioner,

v.

HAROLD W. DORAN

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF MICHIGAN

OPINIONS BELOW

The opinion of the Michigan Supreme Court *In the Matter of Doran* (App. 99a) is reported at 401 Mich 235; NW2d 406 (1977). The order of the Michigan Supreme Court denying rehearing (App. 131a) is reported at 402 Mich 951 (1977).

JURISDICTION

The judgment of the Michigan Supreme Court was entered on October 4, 1977. *In the Matter of Doran*, 401 Mich 235; 258 NW2d 406 (1977). The People's motion for rehearing was denied by the Michigan Supreme Court on November 29, 1977. *People* v *Harold W. Doran*, 402 Mich 951 (1977).

This Court's jurisdiction is invoked pursuant to 62 Stat 929 (1948), 28 USC 1257(3).

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

"• • •

"• • •

"(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

The Attorney General of the State of Michigan filed a petition for writ of certiorari which was docketed in this court on February 27, 1978. On April 17, 1978, the Petition for writ of certiorari was granted.

QUESTION PRESENTED

Did the Michigan Supreme Court misconstrue the Fourth Amendment and the extradition clause of the United States Constitution when it held that a fugitive may challenge in a collateral proceeding in the courts of the asylum state a demanding state's extradition documents on the basis that they fail to show probable cause under the Fourth Amendment?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution Amendment IV. The right of the People to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution, Article IV, § 2. The citizens of each state shall be entitled to all Privileges and Immunities of Citizens in the several States. A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime. . . .

62 Stat 822 (1948), 18 USC § 3182:

"Fugitives from State or Territory to State, District or Territory

Whenever the executive authority of any State or Territory demands any person as a fugitive from justice, of the executive authority of any State, District or Territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the State or Territory from whence the person so charged has fled, the executive authority of the State, District or Territory to which such person has fled shall cause

him to be arrested and secured, and notify the executive authority making such demand, or the agent of such authority appointed to receive the fugitive, and shall cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within thirty days from the time of the arrest, the prisoner may be discharged."

For the convenience of the Court, the Arizona and Michigan extradition statutes are appended hereto as Exhibit A.

STATEMENT OF THE CASE

On December 18, 1975, Harold W. Doran was arrested in Bay City, Michigan, and charged with receiving and concealing stolen property under the laws of the State of Michigan. MCLA 750.535; MSA 28.803. The charge arose out of Doran's possession of a truck which he had driven to Michigan from Arizona.

The Bay City Police Department immediately notified local authorities in Maricopa County (Phoenix), Arizona. On January 7, 1976, Arizona authorities issued a warrant for Doran's arrest charging him with the theft of a motor vehicle or in the alternative, theft by embezzlement pursuant to Arizona law. A.R.S. (App. 26a).

On January 12, 1976, Doran was arraigned in Michigan as a fugitive (App. 16a). The Michigan criminal charge, receiving and concealing stolen property, was eventually dismissed. (App. 23a). However, the time of Doran's confinement as a fugitive was extended by a Bay County Magistrate to allow additional time for his arrest to be made under a warrant of the governor of Michigan upon a requisition of Arizona's governor.

On February 11, 1976, the governor of Arizona issued a

requisition for extradition. The requisition was accompanied by the original complaint and warrant plus two supporting affidavits. (App. 34a).

On March 12, 1976, the Michigan governor's warrant was issued. (App. 44a). Doran was arraigned thereon on March 29, 1976.

Doran twice petitioned the arraigning court for a writ of habeas corpus attacking the validity of the governor's warrant on the ground that it was not issued in conformity with the Uniform Criminal Extradition Act, MCLA 780.1-780.31; MSA 28.1285(1)-28.1285(31); A.R.S. 13-1301—13-1328. The court denied both writs (App. 1a).

The Michigan Court of Appeals denied Doran's application for leave to appeal the denial of his first habeas corpus petition and also denied his original habeas corpus petition filed in the Court of Appeals. *People* v *Harold W. Doran*, Michigan Court of Appeals No. 28507 and 30516. (App. 68a). The Michigan Supreme Court granted leave to appeal the first habeas corpus petition on November 1, 1976. *People* v *Harold W. Doran*, 397 Mich 886. On October 4, 1977, the Michigan Supreme Court reversed the trial court's order and ordered the release of Doran forthwith. At that time Doran had been incarcerated without bond pending extradition since December 18, 1975. *In the Matter of Doran*, 401 Mich 235; 258 NW2d 406 (1977). On October 24, 1977, the People of the State of Michigan filed an application for rehearing, and on November 29, 1977, the Michigan Supreme Court denied the application. 402 Mich 951 (1977).

The Attorney General of the State of Michigan filed a petition for writ of certiorari which was docketed in this court on February 27, 1978. On April 17, 1978, the Petition for writ of certiorari was granted.

SUMMARY OF ARGUMENT

The Michigan Supreme Court determined that an asylum state could require official confirmation of probable cause in the extradition documents submitted by a demanding state requesting the rendition of an alleged fugitive. The Michigan Supreme Court accepted the reasoning of *Kirkland* v *Preston*, 128 US App DC 148; 385 F2d 670 (1967), which was quoted at length. *Kirkland* construed 23 D.C. Code § 401(a) and held that a Governor's requisition must be supported by a showing of probable cause and that absent a grand jury indictment or a judicial determination of probable cause, the affidavit accompanying the Governor's requisition must contain facts adequate to sustain a finding of probable cause for issuance of an arrest or search warrant pursuant to Fourth Amendment decisions of this Court. The *Kirkland* and *Doran* opinions focus upon the rights of the accused fugitive rather than the right of a demanding state to demand the production of an individual accused of violating its laws.

The Arizona Rules of Criminal Procedure provide in specific detail the preliminary proceedings required to charge a party with a crime. A.R.S. Rule 2.4 provides that a magistrate before whom a complaint is filed shall subpoena for examination additional witnesses as may be required and that he shall proceed to issue a warrant if he determines there is reasonable cause to believe an offense has been committed. The Arizona Supreme Court has discussed the purpose of the investigation by the magistrate and has indicated that it is to protect the accused from frivolous and malicious charges and that from this the magistrate will subsequently be able to determine whether probable cause exists to support a warrant. *Arizona* v *Lynch*, 107 Arizona 463; 480 P2d 697 (1971); *Erdman* v *Superior Court*, 102 Arizona 524; 433 P2d 972 (1967); *State* v *Currier*, 86 Arizona 394; 347 P2d 29 (1959). The Arizona Rules of Criminal Procedure provide that upon a finding of probable

cause the magistrate shall immediately issue a warrant and the rules specifically state the information that must be contained in the warrant. A.R.S. Rules 3.1 and 3.2. A review of the record in this case will indicate that a justice of the peace in Arizona did issue a warrant which stated that she found "reasonable cause to believe that such offense(s) were committed and that the accused committed them."

Gerstein v *Pugh*, 420 US 103; 95 S Ct 854; 43 L Ed 2d 54 (1975), held that the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest. However, *Gerstein* did not involve extradition and did not purport to either review or overrule the body of case law relative to extradition. *Gerstein* considered the issue of whether a person arrested and held for trial on an information is entitled to a judicial determination of probable cause for detention. This Court indicated that an adversary proceeding is not necessary and that the standard is probable cause to believe the suspect has committed a crime which has traditionally been decided by a magistrate in a nonadversary proceeding using hearsay and written testimony. The *Gerstein* decision was limited to the precise requirements of the Fourth Amendment and recognized the desirability of flexibility and experimentation and the differences in each state's pretrial criminal procedure.

Interstate extradition is a matter of federal law which originates in Article IV, § 2 of the United States Constitution and is effectuated by the current implementing statute, 62 Stat 822 (1948), 18 USC § 3182. Both Michigan and Arizona have uniform extradition acts, MCLA 780.1-780.31; MSA 28.1285(1)-28.1285(31); A.R.S. 13-1301—13-1328, but those statutes do not articulate specific standards for the content of an affidavit which must be forwarded by the demanding state to the asylum state requesting the rendition of an alleged fugitive. Although the states have power to enact these supplementary statutes,

it is clear that in the realm of interstate extradition the Constitution and its implementing federal statutes are supreme.

The Extradition Clause is intended to surmount the barrier of state boundaries in order that the States may bring offenders to speedy trial. It is not intended as a preliminary inquiry into the merits of the criminal prosecution and is merely a summary executive proceeding whereby a criminal may be brought before the appropriate demanding tribunal for trial. *Biddinger* v *Commissioner of Police of the City of New York*, 245 US 128; 38 S Ct 41; 62 L Ed 193 (1917). The object of the rendition clause is to insure that states do not become asylums for fugitives and the clause effectively eliminates state boundaries in order to bring offenders to speedy trial. Extradition is more than a matter of comity; it is the command of the supreme law of the land that a person must be delivered up if he is a fugitive. *Appleyard* v *Massachusetts*, 203 US 222; 27 S Ct 122; 51 L Ed 161 (1906). *Roberts* v *Reilly*, 116 US 80; 6 S Ct 291; 29 L Ed 544 (1885).

An asylum state court in a collateral proceeding should not consider federal, constitutional or other related claims raised by an alleged fugitive. In *Pearce* v *Texas*, 155 US 311; 15 S Ct 116; 39 L Ed 164 (1864), Pearce argued that Alabama indictments were insufficient to authorize his extradition in that they did not indicate that the offenses were committed in the demanding state and that they did not contain the time or place where the alleged offenses occurred. The indictments were found to be in substantial conformity with the Alabama statutes and their sufficiency as a matter of technical pleading was not allowed to be questioned. In *Sweeney* v *Woodall*, 344 US 86; 73 S Ct 139; 97 L Ed 114 (1952), the attempt of a fugitive fom Alabama to challenge his confinement was rejected. He had asserted that his past confinement in an Alabama prison had amounted to cruel and unusual punishment and that any future confinement would similarly violate the rights secured to him by the Constitution. Citing *Dye* v *Johnson*, 338 US 864; 70 S Ct 146; 94 L Ed 530 (1949), and *Ex parte Hawk*, 321 US 114; 64 S Ct 448; 88 L Ed 572 (1944), this Court denied relief to Woodall because he had made no showing that relief was not available to him in the courts of Alabama. It is not to be presumed that the courts of the demanding state will not protect the constitutional rights of the accused. *Biddinger* v *Commissioner of Police*, 245 US 128; 38 S Ct 41; 62 L Ed 193 (1917).

In *Pierce* v *Creecy*, 210 US 387; 28 S Ct 714; 52 L Ed 1113 (1908), a fugitive alleged that a Texas indictment returned against him did not adequately charge him with a crime. In rejecting his argument it was indicated that the only safe rule is to abandon entirely the standard to which the indictment must conform and consider only whether it shows satisfactorily that the fugitive has been charged, however inartificially, with crime in the state from which he fled. It is clear that the Constitution neither requires nor permits review of a sister state's indictment in a habeas corpus proceeding.

In *In the Matter of Strauss*, 197 US 324; 25 S Ct 535; 49 L Ed 774 (1905), the petitioner was charged by affidavit. Strauss contended that the statute allowing delivery of the fugitive based upon an affidavit made before a justice of the peace violated the Fourth Amendment. Relief was denied and "a party is charged with crime when an affidavit is filed, alleging the commission of the offense and a warrant is issued for his arrest, and this is true whether a final trial may or may not be had upon such charge." 197 US 330. In *Strauss* the argument was also made and rejected that people may be wrongly extradited. The Court noted that extradition is simply one step in securing the arrest and detention of the defendant and that the extradition proceedings are not fully completed until the party is brought to the court in which trial may be had.

In *Compton* v *State of Alabama*, 214 US 1; 29 S Ct 605; 53 L

Ed 885 (1909), the court indicated that a Georgia notary public could be deemed a magistrate for purposes of a statute which required that a factual affidavit must be sworn to before a magistate of the state charging the fugitive. When the executive authority of the respective states, the one in making a requisition and the other in issuing a warrant for the arrest of the alleged fugitive, considers an affidavit as a sufficient basis in law for their acting the judiciary should not interfere on habeas corpus and discharge the accused unless it appears what was done was in plain contravention of law.

Several decisions of lower federal and state courts have held that the asylum state consistent with the extradition clause may not look behind the demanding state's documents and may not consider federal constitutional claims raised by the fugitive. Unlike the Michigan decision these courts have consistently stated that extradition is a summary proceeding which is but one step in securing arrest and detention. A court in an asylum state conducts a very limited inquiry on applications for habeas corpus to decide whether a crime has been charged in the demanding state, whether the fugitive in custody is the person charged, and whether the fugitive was in the demanding state at the time the alleged crime was committed. In refusing to require a prerendition probable cause determination, these States have acknowledged that the Extradition Clause is in the nature of a treaty stipulation and is designed to enable states to aid one another. The focus of the inquiry by the asylum state is upon the fugitive status of the accused, and this inquiry will adequately protect the accused because the asylum state will be able to require proof that the accused is a fugitive from the demanding state and that he is charged with a crime pursuant to *In the Matter of Strauss*, 197 US 324; 25 S Ct 535; 49 L Ed 774 (1905). Leaving the probable cause inquiry to the courts of the demanding state places the determination in the forum best suited to determine the merits of the matter. Adoption of the *Doran* rationale would frustrate the purposes of the

Extradition Clause by engendering protracted litigation, and inevitably fugitives would attempt to raise other constitutional challenges which heretofore were not proper subjects for consideration by the courts of an asylum state.

ARGUMENT

I.

THE OPINION OF THE MICHIGAN COURT IS BASED PRIMARILY ON KIRKLAND v PRESTON AND THE RIGHTS OF A DEFENDANT, WHILE IGNORING THE LAWS OF A DEMANDING STATE REGARDING THE ISSUANCE OF ARREST WARRANTS.

Harold W. Doran argued in the Michigan Supreme Court that he could not be extradited to Arizona because that state's warrant and affidavit supporting the requisition for the Michigan governor's warrant did not reflect an adequate showing of probable cause. The Michigan Supreme Court agreed and ordered Doran released from custody. The opinion of the Michigan Supreme Court was based on *Kirkland* v *Preston*, 128 US App DC 148; 385 F2d 670 (1967), which was quoted at length. In *Kirkland* the United States Court of Appeals for the District of Columbia, construing 23 D.C. Code § 401(a), held that a governor's requisition must be supported by a showing of probable cause and that absent a grand jury indictment or a judicial determination of probable cause, the affidavit accompanying the governor's requisition must contain facts adequate to sustain a finding of probable cause for issuance of an arrest or search warrant pursuant to Fourth Amendment decisions of this Court.

The Michigan Supreme Court found in *Doran* that there was no indictment or document reflecting a prior judicial deter-

mination of probable cause. 407 Mich 240-241. The Michigan Court specifically found that the Arizona complaint and arrest warrent were phrased in conclusory language mirroring the pertinent state statutes and that the two documents did not set out facts which would justify a Fourth Amendment finding of probable cause. The court found that the complaining police officer's initial affidavit was factually void and found that its earlier holding in *Williams* v *Wayne County Sheriff*, 393 Mich 204; 235 NW2d 552 (1975), did not decide the instant question. In *Williams* an equally divided court affirmed the denial of a petition for writ of habeas corpus sought by a Michigan resident resisting extradition. Three members of the Michigan Supreme Court indicated that the court would not look behind the face of an indictment. Three other members of the Court quoted and relied upon *Kirkland* v *Preston* and would have allowed Williams to introduce proof tending to support his contention that the indictment was a forgery.

As in *Kirkland* v *Preston* the Michigan Supreme Court distinguished in *Doran* between an indictment and an affidavit and indicated that its holding would not extend to an indictment.

The court cited Michigan law which provides that an arrest warrant shall issue "[i]f it appears from such examination" that an offense has in fact been committed. However, the court indicated that the Michigan practice has not been to conduct an examination to establish probable cause, citing *People* v *Burrill*, 391 Mich 124, 129; 214 NW2d 823 (1974), and MCLA 766.3; MSA 28.921. The opinion also indicates that in Michigan an accused is entitled to a prompt preliminary examination.

The Michigan Supreme Court then stated that it is "not clear whether there was an independent judicial determination of probable cause made by the Arizona magistrate before issuance of the governor's rendition." 401 Mich 249. The court

relied upon the asserted Michigan practice of issuing arrest warrants without requiring a showing of probable cause and based on that reliance determined that there is "no reason to assume that the Arizona affidavit was made upon a showing, not of record, of probable cause."

The Michigan Supreme Court indicated that it does believe that " '[t]he guilt or innocence of the accused as to the crime of which he is charged may not be inquired into by the governor or in any proceeding after the demand for extradition' MCLA 780.19; MSA 28.1283(19)", but has determined "that Michigan may not arrest, detain and render to the demanding state a person accused of a crime unless that state submits an indictment or a judicial determination of probable cause or adequate, factual affidavit(s) reflecting probable cause." Because Harold Doran had been in custody since December 18, 1975, the court believed it appropriate that he be released forthwith. Unlike *Kirkland* v *Preston*, the demanding state, Arizona, was not provided with notice of the court's intended action and was not given the opportunity to supply additional information prior to Doran's release.

II.

THE ARIZONA RULES OF CRIMINAL PROCEDURE PROVIDE THAT A MAGISTRATE MAY CONSIDER INFORMATION IN ADDITION TO THAT FOUND IN THE COMPLAINT AND SUPPORTING AFFIDAVITS IN DETERMINING WHETHER THERE IS REASONABLE CAUSE TO ISSUE AN ARREST WARRANT.

Criminal proceedings in Arizona are governed by the Arizona Rules of Criminal Procedure. The current rules were promulgated April 17, 1973, and became effective September 1, 1973. The rules set forth in detail the preliminary proceedings

required to charge a party with a crime. A.R.S. Rule 2.2 governs the commencement of felony actions and provides as follows:

> "Felony actions may be commenced:
>
> "a. By indictment, which may or may not be preceded by a complaint; or
>
> b. By the filing of a complaint before a magistrate in a non-record court, or in a court of record with permission of the judge of such court."

The rules indicate that a complaint is a written statement of the essential facts constituting a public offense, made upon oath before a magistrate. A.R.S. Rule 2.3.

Upon the filing of a complaint, it is the duty of the magistrate to determine whether there is reasonable cause to believe an offense has been committed. A.R.S. Rule 2.4 provides:

> "The magistrate before whom a complaint is filed shall subpoena for examination such witnesses as he deems necessary, and such additional witnesses as may be requested by the prosecutor. If he determines from the complaint, any affidavits filed, and any testimony taken, that there is reasonable cause to believe an offense has been committed and the defendant committed it, he shall proceed under Rule 33.1; if not, he shall dismiss the complaint."

In *Arizona* v *Lynch*, 107 Ariz 463; 480 P2d 697 (1971), the Supreme Court of Arizona discussed the functions of the magistrate when a complaint is filed by a third party who does not have personal knowledge of the crime.

Lynch contended that his preliminary hearing was in violation of the Arizona and federal Constitution because the Justice of the Peace had interviewed the victims of the crime.

> "On this point also, we find no error to have been committed. The complaint in this case was filed by a third party adult with no personal knowledge of the crime. In State v. Currier, 86 Ariz. 394, 347 P.2d 29 (1959) we held such complaints to be proper. But when a complaint is made upon information and belief, there arises a duty upon the magistrate or Justice of the Peace to make further inquiry into the source of the complainant's information and the grounds of his belief. The purpose of this investigation is to protect the accused from frivolous and malicious charges. The magistrate should not accept the complainant's mere conclusion. From this the magistrate will subsequently be able to determine in his own mind whether probable cause exists to support a warrant. State v. Currier, supra; Erdman v. Superior Court of Maricopa County, 102 Ariz. 524, 433 P.2d 972 (1967). Thus it is proper and, in fact, to the accused's benefit that such a preliminary investigation be held to determine the basis, if any, of a complaint issued on information and belief." 107 Ariz 464.

See also *Erdman* v *Superior Court*, 102 Ariz 524; 433 P2d 972 1967.

The Arizona Supreme Court has opined that the Arizona Rules of Criminal Procedure satisfy the right of an accused person to be free from arrest save upon a showing of probable cause. *State* v *Currier*, 86 Ariz 394, 400; 347 P2d 29 (1959).

The sufficiency of a complaint is to be determined by the law applicable where the complaint is laid and unless an indictment or affidavit is clearly void, its validity will be left to the courts of the demanding state. *Ex parte Rubens*, 73 Ariz 101, 107, 108; 238 P2d 402 (1951), *cert den* 344 US 840; 73 S Ct 50; 97 L Ed 653 (1952).

A.R.S. Rule 3.1 of the Arizona Rules of Criminal Procedure

provides that upon a finding of probable cause pursuant to A.R.S. Rule 2.4, the magistrate shall immediately issue a warrant or a summons. The warrant must be signed by the issuing magistrate and contain the name of the defendant or, if his name is unknown, any name or description by which he can be identified with reasonable certainty. The warrant must state the offense with which the defendant is charged and command that the defendant be arrested and brought before the issuing magistrate or, if he is absent or unable to act, the nearest or most accessible magistrate in the same county. A.R.S. Rule 3.2.

It is clear from a review of the record (App. 26a) that an Arizona justice of the peace did issue a warrant for Harold Doran's arrest charging him with theft of a motor vehicle or in the alternative, theft by embezzlement. The arrest warrant clearly states that the magistrate found "reasonable cause to believe that such offense(s) were committed and that the accused committed them." (App. 26a) A review of the warrant indicates that it fully complies with Arizona Rule of Criminal Procedure 3.2 which governs the contents of an arrest warrant.

Harold Doran contends that the Arizona arrest warrant is mere "boiler plate" and indicates that the warrant merely repeats the contents of the relevant Arizona statutes which he is charged with violating. However, it is clear that the magistrate has signed a warrant stating she found reasonable cause and that the warrant complies with the relevant Arizona Rules of Criminal Procedure. If Doran wishes to challenge the wisdom or constitutionality of Arizona's criminal procedures, he has access to the state and federal courts in Arizona which are fully competent to entertain any challenge he wishes to raise and which will adequately protect his Constitutional rights. *Biddinger* v *Commissioner of Police*, 245 US 128; 38 S Ct 41; 62 L Ed 193 (1917).

Harold Doran has never been asked to prove that the magi-

strate did not consider other information at the time she issued the warrant. Although the burden is on the Petitioner when he seeks a writ of habeas corpus to clearly demonstrate that the demanding state has violated the Constitution or the relevant statutes, Harold Doran has never done so. The record does not demonstrate that the Arizona magistrate did not follow the relevant Arizona law. The Michigan Supreme Court assumed that because Michigan often allegedly does not follow the relevant Michigan laws that the Arizona magistrate did not follow the relevant Arizona law. Arizona was not notified of the hearings in the Michigan courts and was not given the opportunity to present any evidence at a habeas corpus hearing to support its determination of probable cause. (People's Brief on appeal to the Michigan Supreme Court - page 7).

III.

KIRKLAND v PRESTON HOLDS THAT UNDER THE FOURTH AMENDMENT THE POTENTIAL HARDSHIP ON THE ACCUSED FUGITIVE MANDATES A FINDING OF PROBABLE CAUSE FOR ARREST BY THE ASYLUM STATE.

The Michigan Supreme Court quotes at length and relies upon *Kirkland* v *Preston*, 128 US App DC 148; 385 F2d 670 (1967), which involved the attempted extradition of Oliver Lee Kirkland and Elizabeth Marie Smith from the District of Columbia to Florida. The chief judge of the District Court acting in the role of chief executive for the District of Columbia issued warrants for the arrest of Kirkland and Smith with the view toward their extradition to the state of Florida. The chief judge had before him papers submitted by the governor of Florida which consisted of a Miami, Florida, police officer's affidavit sworn to before a justice of the peace; an arrest warrant issued by the same justice of the peace; and a requisition form executed by the governor certifying the au-

thenticity of the accompanying documents and formally demanding appellants arrest and delivery to Florida officials. The chief judge in the extradition hearing which followed the arrest of Kirkland and Smith had ruled that he would not consider the matter of probable cause and concluded that the appellants had been "substantially charged" and ordered them bound over for extradition. Kirkland and Smith pursued their habeas corpus remedy in the District Court which ruled that the affidavit was sufficient and discharged the writ. An appeal to the Court of Appeals for the District of Columbia Circuit ensued.

The Florida affidavit provided that Kirkland and Smith did "unlawfully, willfully, maliciously and feloniously set fire to and burn, or cause to be burned, a certain building to wit; the Hut Bar, located at 2280 S.W. 32nd Avenue, City of Miami, Dade County, Florida, a further and more particular description of said bar being to the affiant unknown, said bar being the property of one Fredrich Ritter:" 385 F2d 672. The Circuit Court stated that the language in the affidavit mirrored the text of the Florida second degree arson statute, FSA § 806.02, and found that the affidavits were framed in conclusory statutory language, lacked any identification of sources, and did not show probable cause under the Fourth Amendment.

The holding in *Kirkland* is based upon an analysis of several cases which led the court to conclude that the Fourth Amendment standard of probable cause is a minimal and uniform requirement of a valid arrest by state officers.[1]

---

[1]
Wolf v *People of State of Colorado*, 338 US 25; 69 S Ct 1359; 93 L Ed 1782 (1949); *Mapp* v *State of Ohio*, 367 US 643; 81 S Ct 1684; 6 L Ed 2d 1081 (1961); *Beck* v *State of Ohio*, 379 US 89; 85 S Ct 223; 13 L Ed 2d 142 (1964); *Ker* v *State of California*, 374 US 23; 83 S Ct 1623; 10 L Ed 2d 726 (1963).

The *Kirkland* court considered *In the Matter of Strauss*, 197 US 324; 25 S Ct 535; 49 L Ed 774 (1905), but said inasmuch as it was decided prior to *Wolf* v *People of the State of Colorado*, 338 US 25; 69 S Ct 1359; 93 L Ed 1782 (1949), there was no reason why the Fourth Amendment which governs criminal arrests should not govern extradition arrests. The *Kirkland* court opined that an extradition demand accompanied by an indictment embodies a grand jury's judgment that probable cause exists, but that the court would subject to closer scrutiny extradition papers relying on an affidavit, even where that affidavit is supported by a warrant of arrest.

The key to the *Kirkland* holding was the court's concern regarding the hardship attendant upon an individual who is extradited. The suspension of the individual's liberty and his travel from one state to another jurisdiction which may be far distant are factors which led the *Kirkland* court to state that the accused should be surrounded with "considerable procedural protection to stave off wrongful rendition." 385 F2d 676. Based on that concern for treatment of the accused, the court found it appropriate to require an official confirmation of probable cause in the asylum state in view of the fact that the accused would have no opportunity for an evidentiary preliminary hearing until he finally arrived in the demanding jurisdiction. 385 F2d 676.

It is clear that the *Kirkland* court focused upon the rights of the accused and not upon the rights of the demanding state. The balance drawn by *Kirkland* is hardship to the fugitive in contrast with asserted inconvenience to the sister state which has averred that her laws have been violated. *Kirkland* really holds that a fugitive is entitled to two probable cause determinations—one by the demanding state and official confirmation of probable cause in the asylum state after the asylum state's governor has issued his warrant of rendition.

IV.

GERSTEIN v PUGH, 420 US 103; 95 S Ct 854; 43 L Ed 2d 54 (1975), WHICH REQUIRES THAT A LENGTHY RESTRAINT OF LIBERTY BE ACCOMPANIED BY A PROBABLE CAUSE DETERMINATION, WAS NOT AN EXTRADITION CASE, AND HAS NO IMPACT UPON THIS COURT'S DECISIONS REGARDING EXTRADITION.

Gerstein v *Pugh*, 420 US 103; 95 S Ct 854; 43 L Ed 2d 54 (1975), held that the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest. However, it should be noted that *Gerstein* did not involve extradition and did not purport to either review or overrule the body of cause law relative to extradition. Pugh and Henderson were charged with several offenses by a prosecutor's information, and the record did not indicate whether there was an arrest warrant issued for either individual. 420 US 105. Therefore, the issue framed in *Gerstein* was "whether a person arrested and held for trial on an information is entitled to a judicial determination of probable cause for detention." 420 US 111. While indicating that the maximum protection of individual rights could be assured by always requiring a magistrate's review before an arrest, this Court stated that:

> ". . . [S]uch a requirement would constitute an intolerable handicap for legitimate law enforcement. Thus, while the Court has expressed a preference for the use of arrest warrants when feasible . . ., it has never invalidated an arrest supported by probable cause solely because the officers failed to secure a warrant." 420 US 113

The opinion goes on to state that "once the suspect is in custody, however, the reasons that justify dispensing with the magistrate's neutral judgment evaporate." 420 US 114. The

foregoing would pertain if there had never been a determination of probable cause and the person had been arrested merely on the strength of an information without the issuance of an arrest warrant.

Under the Florida procedure challenged in *Gerstein* a person could be arrested without a warrant, charged by information, and jailed for a lengthy pretrial detention without any opportunity for a probable cause determination.

In indicating that an adversary proceeding is not necessary in a probable cause determination this court stated:

> "The sole issue is whether there is probable cause for detaining the arrested person pending further proceedings. This issue can be determined reliably without an adversary hearing. The standard is the same as that for arrest. That standard—probable cause to believe the suspect has committed a crime—traditionally has been decided by a magistrate in a non-adversary proceeding on hearsay and written testimony, and the Court has approved these informal modes of proof." 420 US 120.

Thus, while requiring a determination of probable cause and concluding that an adversary determination was necessary, it was recognized that state systems of criminal procedure vary widely, that there is no single preferred pretrial procedure, and that the nature of the probable cause determination usually will be shaped to accord with a state's pretrial procedure viewed as a whole. The *Gerstein* holding was limited to the precise requirements of the Fourth Amendment and recognized the desirability of flexibility and experimentation by the States.

> "It may be found desirable, for example, to make the probable cause determination at the suspect's first appearance before a judicial officer, see *McNabb v United States*,

318 US 332, 342-344, 87 L Ed 819, 63 S Ct 608 (1943), or the determination may be incorporated into the procedure for setting bail or fixing other conditions of pretrial release." 420 US 123-124.

This court's statements in *Gerstein* v *Pugh* regarding the right of each State to articulate its own pretrial criminal procedures is consistent with *Morrissey* v *Brewer*, 408 US 471; 92 S Ct 2573; 33 L Ed 2d 484 (1972), which indicates that each State has the responsibility to write its own code of procedure or pass its own legislation concerning parole revocation and the procedures which must be undertaken to protect the due process rights of the individual parolee.

The Court of Appeals for the First Circuit has considered *Gerstein* and rejected the case as authority for the proposition that there must be a probable cause determination by the asylum state.

> "Respondents seem to assume that if a judicial determination of probable cause must precede extradition, it must be provided by the courts of the asylum state, where the fugitive is held. This is not so. *Gerstein* explicitly rejected the need for adversarial procedures; it required only the neutral and detached judgment of a judicial officer or tribunal, and contemplated that this could be provided before as well as shortly after arrest. Thus nothing in *Gerstein* prevents the demanding state from providing the requisite pre-rendition determination of probable cause." *Ierardi* v *Gunter*, 528 F2d 929, 930-931 (CA 1, 1976)

Clearly the Fourth Amendment probable cause requirement may be read in harmony with the Constitution's extradition clause and with the federal statute. This harmony may be achieved by allowing the demanding state to make its own

probable cause determination and thus obviate any need or reason for a probable cause finding in the asylum state. There is also no reason for the asylum state to review the adequacy of the probable cause finding in the demanding state. Instead the asylum state should be permitted to rely on the presumption of regularity of the demanding state's probable cause determination. *Biddinger* v *Commissioner*, 245 US 128; 38 S Ct 41; 62 L Ed 193 (1917); *Pearce* v *Texas*, 155 US 311; 15 S Ct 116; 39 L Ed 164 (1894).

V.

INTERSTATE EXTRADITION IS A MATTER OF FEDERAL LAW WHICH HAS AS ITS BASIS ARTICLE IV, § 2 OF THE CONSTITUTION AS IMPLEMENTED BY 62 STAT 822 (1948), 18 USC § 3182.

Interstate extradition is a matter of federal law which originates in Article IV, § 2 of the United States Constitution:

> "A person charged in any state with Treason, Felony, or other crime, who shall flee from justice, and be found in another state, shall on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime. . . ."

This provision of the Constitution has been effectuated by Congress, the current implementing statute being, 62 Stat 822 (1948), 18 USC § 3182.

> "Whenever the executive authority of State or Territory demands any person as a fugitive from justice, of the executive authority of any State, District or Territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate

> of any State or Territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the State or Territory from whence the person so charged has fled, the executive authority of the State, District or Territory to which such person has fled shall cause him to be arrested and secured, and notify the executive authority making such demand, or the agent of such authority appointed to receive the fugitive, and shall cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within thirty days from the time of arrest, the prisoner may be discharged."

However, the act does not define the term "charging the person demanded" and does not indicate what material is required to be contained within the affidavit.

The Michigan and Arizona Uniform Criminal Extradition Acts contain sections relative to the form of demand which will be honored. MCLA 780.1—780.31; MSA 28.1283(1)-28.1283 (31); A.R.S. 13-1301—13-1328. The Michigan statute provides that no demand will be honored unless it is in writing accompained by a governor's requisition under the seal of the state; the prosecutor's application for requisition; a verification by affidavits of the application which must be accompanied by certified copies of the indictment returned or information and affidavit filed or of the complaint made to the judge or magistrate and the warrant issued thereon or the judgment of conviction or of sentence imposed; and an executive warrant under the seal of the state authorizing the agent therein named to receive the person demanded. The Michigan statute further provides that the indictment, information, or affidavit made before the magistrate must substantially charge the person with having committed a crime under the law of that state and the indictment, information, affidavit, judgment, conviction, or sentence must be authenticated by the executive authority. MCLA 780.3; MSA 28.1283(3).

The Arizona statute also does not articulate specific standards for the contents of the affidavit and also contains the substantially charged language of the Michigan statute. A.R.S. 13-1303 provides:

> "A. No demand for the extradition of the person charged with crime in another state shall be recognized by the governor unless in writing and accompanied by a copy of an indictment found or by an information supported by affidavit in the state having jurisdiction of the crime, or by a copy of an affidavit made before a magistrate there.
>
> "B. The indictment, information, or affidavit made before the magistrate must substantially charge the person demanded with having committed a crime under the law of that state, and the copy must be authenticated by the executive authority making the demand, which shall be prima facie evidence of its truth."

Although the states have the power to enact these supplemental statutes, it is clear that in the realm of interstate extradition Article IV, § 2 of the United States Constitution and 62 Stat 88 (1948), 18 USC § 3182, are supreme and override contrary state statutes. *Norton* v *State*, 93 Idaho 648; 470 P2d 413 (1970), *cert den* 401 US 936; 91 S Ct 918; 28 L Ed 2d 215 (1971); *In re Hunt*, 276 F Supp 1122 (E.D. Mich, 1967), vacated and writ discharged, 408 F2d 1086 (CA 6, 1969), *cert den* 396 US 845; 90 S Ct 81; 24 L Ed 2d 95 (1969); *Smith* v *State of Idaho*, 373 F2d 149 (CA 9, 1967), *cert den* 388 US 919; 87 S Ct 2139; 18 L Ed 2d 1364 (1967).

VI.

THE EXTRADITION CLAUSE IS INTENDED TO SURMOUNT THE BARRIER OF STATE BOUNDARIES IN

ORDER THAT A STATE MAY BRING OFFENDERS TO SPEEDY TRIAL AND SHOULD BE LIBERALLY CONSTRUED.

In *Biddinger* v *Commissioner of Police of the City of New York*, 245 US 128; 38 S Ct 41; 62 L Ed 193 (1917), this Court was presented with the question of whether the District Court erred in excluding evidence offered to prove that the accused had been a resident of the state of Illinois for more than three years after the dates on which he was charged with having committed crimes in the state of Illinois. As this Court indicated in its opinion, Article IV, § 2 of the Federal Constitution first appeared in the Articles of Confederation of 1781 where it was used to describe and continue in effect the practice of the colonies with respect to the extradition of criminals, citing *Kentucky* v *Denison*, 65 US (24 How) 66; 16 L Ed 717 (1861).

Extradition is not intended as a preliminary inquiry into the merits of criminal prosecution but is merely a summary executive proceeding whereby a criminal may be brought before the appropriate demanding tribunal for trial.

> "The language was not used to express the law of extradition as usually prevailing among independent nations but to provide a summary executive proceeding by the use of which the closely associated States of the Union could promptly aid one another in bringing to trial persons accused of crime by preventing their finding in one State an asylum against the processes of justice of another. *Lascelles* v. *Georgia*, 148 U.S. 537. Such a provision was necessary to prevent the very general requirement of the state constitutions that persons accused of crime shall be tried in the county or district in which the crime shall have been committed from becoming a shield for the guilty rather than a defense for the innocent, which it was intended to be. Its design was and is, in effect, to eliminate, for this purpose, the boundaries of States, so that each may reach

> out and bring to speedy trial offenders against its laws from any part of the land.
>
> "Such being the origin and purpose of these provisions of the Constitution and statutes, they have not been construed narrowly and technically by the courts as if they were penal laws, but liberally to effect their important purpose, with the result that one who leaves the demanding State before prosecution is anticipated or begun, or without knowledge on his part that he has violated any law, or who, having committed a crime in one State, returns to his home in another, is nevertheless decided to be a fugitive from justice within their meaning. *Roberts* v. *Reilly*, 116 U.S. 80; *Appleyard* v. *Massachusetts*, 203 U.S. 222; *Kingsbury's Case*, 106 Massachusetts, 223.
>
> "Courts have been free to give this meaning to the Constitution and statutes because in delivering up an accused person to the authorities of a sister State they are not sending him for trial to an alien jurisdiction, with laws which our standards might condemn, but are simply returning him to be tried, still under the protection of the Federal Constitution but in the manner provided by the State against the laws of which it is charged that he has offended." 245 US 132-133.

In *Appleyard* v *Massachusetts*, 203 US 222; 27 S Ct 122; 51 L Ed 161 (1906), the governor of Massachusetts issued a warrant for the arrest of Appleyard who had been indicted in New York for the crime of grand larceny and, after arrest, Appleyard applied for a writ of habeas corpus in the Supreme Judicial Court of Massachusetts. Appleyard pleaded that on the evidence it did not appear that he was a fugitive from justice and that he should be discharged from custody unless it appeared positively by a preponderance of proof that he had consciously fled from justice when he left the state of New York. In disposing of Appleyard's contention this Court opined that the

inquiry is not whether a person consciously fled from justice to avoid prosecution, but whether in fact he is a fugitive from justice. In reaching the holding, the rule was articulated that a person must be delivered up if he is a fugitive because such is the command of the supreme law of the land which may not be disregarded.

> "A person charged by indictment or by affidavit before a magistrate with the commission with a State of a crime covered by its laws, and who, after the date of the commission of such crime leaves the State—no matter for what purpose or with what motive, nor under what belief—becomes, from the time of such leaving, and within the meaning of the Constitution, and the laws of the United States, a fugitive from justice, and if found in another State must be delivered up by the Governor of such State to the State whose laws are alleged to have been violated, on the production of such indictment or affidavit, certified as authentic by the Governor of the State from which the accused departed. Such is the command of the supreme law of the land, which may not be disregarded by any State. The constitutional provision relating to fugitives from justice as the history of its adoption will show, is in the nature of a treaty stipulation entered into for the purpose of securing a prompt and efficient administration of the criminal laws of the several States—an object of the first concern to the people of the entire country, and which each State is bound, in fidelity to the Constitution to recognize. A faithful, vigorous enforcement of that stipulation is vital to the harmony and welfare of the States. And while a State should take care, within the limits of the law, that the rights of its people are protected against illegal action, the judicial authorities of the Union should equally take care that the provisions of the Constitution be not so narrowly interpreted as to enable offenders against the laws of a State to find a permanent asylum in the territory of another State." 206 US 227-228.

Thus *Biddinger* v *Commissioners, supra*, and *Appleyard* v. *Massachusetts, supra*, make it clear that the object of the rendition clause is to insure that states do not become asylums for fugitives and the clause effectively eliminates state boundaries in order to bring offenders to speedy trial. Extradition is not merely a matter of comity but is to be a summary proceeding which will enable the States to promptly aid one another in bringing persons to trial. From these opinions it appears rather clear that the provisions of the Constitution should be interpreted in a manner which safeguards the right of the demanding state, whose laws have been violated, to obtain the arrest and surrender of an accused individual for further proceedings.

In another indictment case, *Roberts* v *Reilly*, 116 US 80; 6 S Ct 291; 29 L Ed 544 (1885), this Court spoke of the duty of a governor of an asylum state to cause the arrest of an alleged fugitive from justice whenever the executive authority of any state demands such fugitive from justice "and produces a copy of an indictment found, or affidavit made, before a magistrate of any state, charging the person demanded with having committed a crime therein, certified as authentic by the governor or chief magistrate from whence the person so charged has fled." 116 US 95.

When a governor issues his warrant of arrest upon a demand made by another state that warrant for arrest must be regarded as sufficient to justify removal until the presumption in favor of the warrant is overcome by contrary proof. *Ex parte Reggel*, 114 US 642; 5 S Ct 1148; 29 L Ed 250 (1885).

In *Roberts* v *Reilly, supra*, the petitioner objected to the sufficiency of the indictment, and this Court found that the indictment was certified by the governor of New York to be authentic and was duly authenticated which is all that was required by the act of Congress.

> "It charges a crime under and against the laws of that

State. It is immaterial that it does not appear that a certified copy of such laws was furnished to the governor of Georgia. The statute does not require it, and the governor could have insisted, and it is to be presumed did insist, upon the production of whatever he deemed necessary or important properly to inform him on the subject. And the courts of the United States, to whose process the relator has appealed, take judicial notice of the laws of all the States." 116 US 96.

VII.

FEDERAL CONSTITUTIONAL AND OTHER RELATED CLAIMS MAY NOT BE CONSIDERED BY AN ASYLUM STATE COURT IN A COLLATERAL PROCEEDINC

In *Pearce* v *Texas*, 155 US 311; 15 S Ct 116; 39 L Ed 164 (1864), George A. Pearce was arrested in the State of Texas upon the requisition of the governor of the State of Alabama. Pearce argued that he was entitled to be discharged and that the indictments were insufficient to authorize his extradition. He alleged that the indictment did not indicate that the offenses were committed in the State of Alabama and in violation of her laws, that the indictments were wholly void in that no time or place was indicated within them, and that it did not appear where the offenses were committed. The indictments were found to be in substantial conformity with the statutes of Alabama and their sufficiency as a matter of technical pleading was not to be inquired into on habeas corpus. *Ex parte Reggel*, 114 US 642; 5 S Ct 1148; 29 L Ed 250 (1885). This Court clearly indicated that the Texas court was correct in leaving constitutional challenges to Alabama law to the courts of Alabama:

> "What the state court did was to leave the question as to whether the statute was in violation of the Constitution of the United States, and the indictments insufficient accordingly, to the demanding State. Its action in that regard simply remitted to the courts of Alabama the duty of protecting the accused in the enjoyment of his constitutional rights, and if any of those rights should be denied him, which is not to be presumed, he could then seek his remedy in this court." 155 US 314.

Pearce stands for the principle that the courts of the asylum State should leave to the demanding State her right to decide challenges to her laws and procedures even if the documents charging a crime may well be insufficient. *Pearce* also clearly indicates that it is not to be presumed that the courts of the demanding State will not protect the constitutional rights of the accused. *Biddinger* v *Commissioner of Police*, 245 US 128; 38 S Ct 41; 62 L Ed 193 (1917).

In *Sweeney* v *Woodall*, 344 US 86; 73 S Ct 139; 97 L Ed 114 (1952), the attempt of a fugitive from Alabama to challenge his confinement was rejected. Woodall had asserted that his past confinement in an Alabama prison had amounted to cruel and unusual punishment and that any future confinement administered by Alabama would similarly violate the rights secured to him by the Constitution. Citing *Dye* v *Johnson*, 338 US 864; 70 S Ct 146; 94 L Ed 530 (1949), and *Ex Parte Hawk*, 321 US 114; 64 S Ct 448; 88 L Ed 572 (1944), this Court considered whether a district court should entertain on the merits a fugitive's application alleging Constitutional deprivations. Emphasis was placed upon the fact that the petitioner had asked a federal court in the asylum state to pass upon the constitutionality of his incarceration in the demanding state although the demanding state was not a party before the federal court and the petitioner had made no attempt to raise the question in the demanding state. Relief was denied because Woodall had made no showing that relief was unavailable to him in the courts of Alabama. The opinion noted that if Woodall had not escaped he would have been required under the provisions of 62 Stat 967 (1948), 28 USC § 2254 and *Ex parte Hawk*, supra,

to exhaust all available remedies in the state courts before making an application to the federal court sitting in Alabama.

> "By resort to a form of 'self help,' respondent has changed his status from that of a prisoner of Alabama to that of a fugitive from Alabama. But this should not affect the authority of the Alabama courts to determine the validity of his imprisonment in Alabama. The scheme of interstate rendition, as set forth in both the Constitution and the statutes which Congress has enacted to implement the Constitution, contemplates the prompt return of a fugitive from justice as soon as the state from which he fled demands him; these provisions do not contemplate an appearance by Alabama in respondent's asylum to defend against the claimed abuses of its prison system. Considerations fundamental to our federal system require that the prisoner test the claimed unconstitutionality of his treatment by Alabama in the courts of that State. Respondent should be required to initiate his suit in the courts of Alabama, where all parties may be heard, where all pertinent testimony will be readily available and where suitable relief, if any is necessary, may be fashioned. (Footnotes omitted). 344 US 89-90.

In concurrence Mr. Justice Frankfurter stated that due regard for the relationship of the States in our federal system and for the relationship of the courts of the United States to those of the States requires that claims, even as serious as those raised by Woodall, first be raised in the courts of the demanding state. Justice Frankfurter also emphasized that there was no suggestion that Woodall would be without opportunity to resort to the courts of Alabama for protection of his constitutional rights.

> "Our federal system presupposes confidence that a demanding State will not exploit the action of an asylum State

> by indulging in outlawed conduct to a returned fugitive from justice." 344 US 91.

VIII.

ANY INDICTMENT MAY NOT BE REVIEWED IN AN ASYLUM STATE IN A HABEAS CORPUS PROCEEDING.

In *Pierce* v *Creecy*, 210 US 387, 402; 28 S Ct 714; 52 L Ed 1113 (1908), the fugitive alleged that a Texas indictment returned against him did not adequately charge him with a crime. He disclaimed the purpose of attacking the indictment as a criminal pleading but attempted to show that the indictment did not charge a crime. This Court was unable to adopt his view "that an objection, good if taken on arrest of judgment, would be sufficient to show that the indictment is not a charge of crime." Such a test would be uncertain especially in view of the varying practices in the different states, and such a test would be entirely inapplicable to the case of a charge of crime by affidavit which is permitted by the Constitution. 210 US 402. Relying on *In re Strauss*, 197 US 324; 25 S Ct 535; 49 L Ed 774 (1905), Mr Justice Moody wrote:

> "The only safe rule is to abandon entirely the standard to which the indictment must conform, judged as a criminal pleading, and consider only whether it shows satisfactorily that the fugitive has been in fact, however inartificially, charged with crime in the States from which he has fled. *Roberts* v *Reilly*, 116 US 80, 95; 29 L Ed 544, 549, 6 Sup St Rep 291; *Pearce* v *Texas*, 155 US 311, 313; 39 L Ed 164, 167 15 S Ct Rep 116, *Hyatt* v *New York*, 198 US 691, 709; 47 L Ed 657, 660, 23 S Ct Rep 456; *Munsey* v *Clough*, 196 US 364, 372; 49 L Ed 515, 516, 25 Ct Rep 282 (*Davis's Case*, 122 Mass 324; State ex rel O'Malley v O'Connor, 38 Minn 243, 36 NW 462;) State ex rel Smith v Goss, 66 Minn 291, 68 NW 1089, re Voor-

hees 32 N.J.L. 141; Ex parte Pearce, 32 Tex. Crim. Rep. 301, 23 SW 15; Re Van Sciever, 42 Neb 772, 47 Am. St. Rep. 730, 60 NW 1037; State ex rel Munsey v Clough, 71 N.H. 594, 53 ATL 1086." 52 L Ed 1120-1121.

In response to Pierce's attacks upon the indictment the Court admitted that if his objections were well founded they would demonstrate that the indictment was bad. However, the Constitution does not require as an indispensable prerequisite to interstate extradition that there be a good indictment or even an indictment of any kind. "It requires nothing more than a charge of crime." 210 US 403. While accepting the argument that it is entirely possible that the indictment is invalid, it is clearly stated that the Constitution neither requires nor permits review of a sister State's indictment in a habeas corpus proceeding.

"This court, in the cases already cited, has said, somewhat vaguely, but with as much precision as the subject admits, that the indictment, in order to constitute a sufficient charge of crime to warrant interstate extradition, need show no more than that the accused was substantially charge with crime. This indictment meets and surpasses that standard, and is enough. If more were required it would impose upon courts, in the trial of writs of habeas corpus, the duty of a critical examination of the laws of states with whose jurisprudence and criminal procedure they can have only a general acquaintance. Such a duty would be an intolerable burden, certain to lead to errors in decision, irritable to the just pride of the states, and fruitful of miscarriages of justice. The duty ought not to be assumed unless it is plainly required by the Constitution; and in our opinion, there is nothing in the letter or the spirit of that instrument which requires or permits its performance." 210 U.S. 404-405.

IX.

A PARTY IS CHARGED WITH A CRIME WHEN AN AFFIDAVIT IS FILED ALLEGING THE COMMISSION OF AN OFFENSE AND A WARRANT IS ISSUED FOR HIS ARREST.

In the Matter of Strauss, 197 US 324; 25 S Ct 535; 49 L Ed 774 (1905), was a case wherein the petitioner was charged by affidavit before a justice of the peace in Ohio with the crime of obtaining $400 worth of jewelry by false pretenses contrary to law of the State of Ohio. He was arrested as a fugitive from justice and taken before a magistrate of the City of New York. The governor of New York issued his warrant directing the police commissioner of New York City to arrest the accused and deliver him to the agent of Ohio. The governor's warrant recited that the requisition was accompanied by an affidavit certified by the governor of Ohio charging the accused with having committed the crime. It was contended that the statute allowing delivery of the fugitive based upon an affidavit and a charge pending before a justice of the peace without jurisdiction to try the case violated the Fourth Amendment of the Constitution. In denying relief Mr. Justice Brewer stated:

"It is contended that the constitutional provision for the extradition of persons 'charged with treason, felony or other crime' requires that the charge must be pending in a court that can try the defendant, and does not include one before a committing magistrate, who can only discharge or hold for trial before another tribunal.

"But why should the word 'charged' be given a restrictive interpretation? It is found in the Constitution, and ordinarily words in such an instrument do not receive a narrow, contracted meaning, but are presumed to have been used in a broad sense, with a view of covering all

contingencies. In *McCulloch* v. *Maryland*, 4 Wheat. 316, one question discussed was as to the meaning of the word 'necessary' as found in the clause of the Constitution giving to Congress power 'to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof.' Chief Justice Marshall, speaking for the court, said (p. 415):

" 'This word, then, like others, is used in various senses; and, in its construction, the subject, the context, the intention of the person using them, are all to be taken into view.

" 'Let this be done in the case under consideration. The subject is the execution of those great powers on which the welfare of a nation essentially depends. It must have been the intention of those who gave these powers, to insure, as far as human prudence could insure, their beneficial execution . . . .'

Under the Constitution each State was left with full control over its criminal procedure. No one could have anticipated what changes any State might make therein, and doubtless the word 'charged' was used in not as its broad significance to cover any proceeding which a State might see fit to adopt by which a formal accusation was made against an alleged criminal. In the strictest sense of the term a party is charged with crime when an affidavit is filed, alleging the commission of the offense and a warrant is issued for his arrest, and this is true whether a final trial may or may not be had upon such charge. It may be, and is true, that in many of the States some further proceeding is, in the higher grade of offenses at least, necessary before the party can be put upon trial, and that the

proceedings before an examining magistrate are preliminary, and only with a view to the arrest and detention of the alleged criminal but extradition is a mere proceeding in securing arrest and detention. An extradited defendant is not put on trial upon any writ which is issued for the purposes of extradition, any more than he is upon the warrant which is issued by the justice of the peace directing his arrest." 197 U.S. 330-331.

In *Strauss* the argument was made that sometimes people are wrongly extradited, as in the case of a false affidavit, and Mr. Justice Brewer quoted *Virginia* v *Paul*, 148 U.S. 107, 119:

"Proceedings before a magistrate to commit a person to jail, or to hold him to bail, in order to secure his appearance to answer for a crime or offense, which the magistrate has no jurisdiction himself to try, before the court in which he may be prosecuted and tried, are but preliminary to the prosecution, and are no more a commencement of the prosecution than is an arrest by an officer without a warrant for a felony committed in his presence."

"But such decisions, instead of making against the use in this constitutional section of the word 'charged' in its broad sense, make in its favor, because, as we have noticed, an extradition is simply one step in securing the arrest and detention of the defendant. And these preliminary proceedings are not completed until the party is brought before the court in which the trial may be had." 197 U.S. 332.

Justice Brewer in *Strauss* disposed of the argument that one may falsely swear in an affidavit by indicating that a prosecuting attorney may also wantonly or ignorantly file an information charging a similar offense:

"But who would doubt that an information, where that is the statutory pleading for purposes of trial, is sufficient to justify an extradition? Such possibilities as these cannot be guarded against. While courts will always endeavor to see that no such attempted wrong is successful, on the other hand care must be taken that the process of extradition be not so burdened as to make it practically valueless. It is but one step in securing the presence of the defendant in the court in which he may be tried, and in no manner determines the question of guilt." 197 U.S. 332-333.

In *Compton* v *State of Alabama*, 214 US 1, 29 S Ct 605; 53 L Ed 885 (1909), Mr. Justice Harlan wrote that a notary public could be deemed a magistrate in Georgia for purposes of a statute which required that a factual affidavit must be sworn to before a 'magistrate' of the state charging the fugitive with the commission of a crime in the state making the demand. In *Compton* the only charge against the fugitive was an affidavit which formed the basis of the official notification of the Georgia governor that Compton had been charged and had fled. In denying relief to the petitioner it was found material to consider whether the affidavit made in the case and certified as authentic by the governor of Georgia was sufficient to authorize the governor of Alabama to issue a warrant. In determining that a notary public was a magistrate, this Court relied upon the law of the demanding state, Georgia, and assumed that when the governor of Alabama issued his warrant of arrest he had also assumed that the notary public was a magistrate under the law of Georgia.

"When it appears, as it does here, that the affidavit in question was regarded by the executive authority of the respective States concerned as a sufficient basis, in law, for their acting,—the one in making a requisition, the other in issuing a warrant for the arrest of the alleged

fugitive—the judiciary should not interfere, on *habeas corpus*, and discharge the accused, upon technical grounds, and unless it be clear that what was done was in plain contravention of law." 214 U.S. 8.

Several decisions of lower federal and state courts have held that the asylum state, consistent with the extradition clause, may not look behind the demanding state's documents in order to consider federal constitutional claims raised by the fugitive. *Wise* v *State*, 197 Neb 831; 251 NW2d 373, 376 (1977) (Speedy trial); *In re Otis Golden*, 65 Cal App 3rd 789; 135 Cal Rptr 512 (1977), appeal dismissed and *cert den*, sub nom, *Golden* v *California*, ... US .....; 98 S Ct 35; 54 L Ed 2d 63 (1977) (probable cause to arrest); *Price* v *Pitchess*, 556 F2d 926, 928 (CA 9, 1977), *cert den*, ... US .....; 98 S Ct 504; 54 L Ed 2d 451 (1977). (Double jeopardy, speedy trial). See also *DeGenna* v *Grasso*, 413 F Supp 427, 431-432 (D Conn, 1976) affirmed, 426 US 913; 96 S Ct 2617; 49 L Ed 2d 368 (1976).

Several state courts have held that the proper forum for determining probable cause or the sufficiency of an affidavit is the demanding state. See *Smith* v. *Stynchcombe*, 234 Ga 780, 218 SE2d 63 (1975); *Smith* v. *State*, 89 Idaho 70, 403 P2d 221 (1965); *People* v. *Lauderdale*, 16 Ill App 3rd 916, 306 NE2d 913 (1974); *People* v. *Woods*, 52 Ill App 2d 48; 284 NE2d 286 (1972); *Bailey* v. *Cox*, 260 Ind 448; 296 NE2d 422 (1973); *McEwen* v. *State, Miss*, 224 So2d, 206 (1969); *In re Ierardi*, 366 Mass 640; 321 NE2d 921 (1975); *Salvail* v. *Sharkey*, 108 R.I. 63; 271 A2d 814 (1970); *Wellington* v. *State*, S.D., 238 NW2d 499 (1976); *State* v. *Hughes*, 68 Wis 2d 662; 229 NW2d 655 (1975); *Marshall* v. *Gidney*, 23 Crim Law Rptr 2117; ..... Pa .....; ..... A2d ..... (1978); *Ault* v *Purcell*, 16 Or App 664; 519 P2d 1285 (1974), *cert den* 419 US 858; 95 S Ct 106; 42 L Ed 2d 92 (1974). Unlike the Michigan decision in the present case these courts have consistently stated that extradition is a summary procedure which is but one step in securing

arrest and detention. *Biddinger* v *Commissioner*, 245 US 128 (1917).

> A court in the asylum state—be it state or federal—conducts a very limited inquiry on applications for habeas corpus in extradition proceedings. *United States ex rel. Tucker* v. *Donovan*, 321 F.2d 114, 116 (2d Cir. 1963), *cert. denied sub nom. Tucker* v. *Kross*, 375 U.S. 977, 84 S.Ct. 496, 11 L.Ed.2d 421 (1964). Specifically,
>
> > "[t]he courts of the asylum state are limited to deciding whether (1) a crime has been charged in the demanding state; (2) the fugitive in custody is the person so charged; and (3) the fugitive was in the demanding state at the time the alleged crime was committed." *Woods* v. *Cronvich*, 396 F.2d 142, 143 (5th Cir. 1968). *Price* v *Pitchess*, 556 F2d 926, 928 (1977).

In refusing to require a pre-rendition probable cause finding California acknowledged that extradition is designed to enable states to aid one another and that the Extradition Clause is in the nature of a treaty stipulation. *Appleyard* v *Massachusetts*, 203 US 222, 227 (1906).

> Under this constitutional provision, extradition is not a matter of mere comity, but an absolute right of the demanding state and duty of the asylum state (*In re Russell, supra*, 12 Cal.3d at p. 234; *In re Morgan* (1966) 244 Cal.App.2d 903, 910 [53 Cal.Rptr. 642]). Thus an asylum state does not refrain from undertaking an examination of a fugitive's guilt merely to avoid procedural delays or complications in the rendition procedure. Rather it does so in recognition of the principle that such an inquiry " 'into the merits of the charge against the prisoner or into the motives which inspired the prosecution in the demanding State . . . exceeds its authority under the constitutional and statutory provisions regulating the extradition of criminals. The man-

> date of the Constitution requires "a person *charged* in any State with a crime" to be delivered by the asylum State to the State whose laws he has violated. That State alone can determine the guilt or innocence of the offending party.' " (Italics ours.) (*In re Kimler, supra*, 37 Cal.2d at p. 572.) The summary nature of the extradition process is not founded upon mere considerations of speed and efficiency in the rendition of fugitives. It is based upon the federal Constitution and implementing statutes which recognize extradition as something more than a matter of mere comity between cooperating states. (*Appleyard* v. *Massachusetts, supra*, 203 U.S. at pp. 227-228 [51 L.Ed. at p. 163]; *In re Russell, supra*, 12 Cal.3d at p. 234; *In re Morgan, supra*, 244 Cal.App.2d at p. 910.)"

In re Otis Golden, 65 Cal App 3rd 789, 795-796; 135 Cal Rptr 512 (1977), appeal dismissed and *cert den*, sub nom, *Golden* v *California*, ... US .....; 98 S Ct 35; 54 L Ed 2d 63 (1977).

The law relative to extradition recognizes that the asylum state may not inquire into the merits of the demanding state's charge against a fugitive. The focus of the inquiry by the asylum state should be upon the fugitive status of the accused. This inquiry will adequately protect the accused because the asylum state will be able to require proof that the accused is a fugitive from the demanding state and is charged with a crime pursuant to the dictates of *In the Matter of Strauss*, 197 US 324; 25 S Ct 535; 49 L Ed 774 (1905).

Leaving the probable cause inquiry to the courts of the demanding state will achieve an accommodation between the duty imposed by the Extradition Clause and the protection required by the Fourth Amendment. It places the determination in the forum best suited to determine the merits of the matter.

Adoption of the *Kirkland* v *Preston* rationale would frustrate the purposes of the Extradition Clause by engendering protracted litigation and inevitably fugitives would attempt to raise other Constitutional challenges which heretofore were not proper subjects for consideration by the courts of an asylum state.

The courts of the demanding state are empowered to protect the rights of an accused, and it is presumed that they will do so.

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the court below should be reversed.

Respectfully submitted,

FRANK J. KELLEY
Attorney General

Robert A. Derengoski
Solicitor General

John A. Wilson
Assistant Attorney General

Jann Ryan Baugh
Assistant Attorney General

525 West Ottawa Street
762 Law Building
Lansing, Michigan 48913
(517) 373-1124

Dated: May 26, 1978

MICHIGAN UNIFORM CRIMINAL EXTRADITION ACT

Act 144, 1937, p 218; eff October 29.

AN ACT relative to and to make uniform the procedure on interstate extradition; to prescribe penalties for the violation of the provisions of this act and to repeal all acts and parts of acts inconsistent with the provisions of this act.

The People of the State of Michigan enact:

§ 28.1285(1) **Definitions.** Section 1. Where appearing in this act, the term "governor" includes any person performing the functions of governor by authority of the law of this state. The term "executive authority" includes the governor, and any person performing the functions of governor in a state other than this state. The term "state," referring to a state other than this state, includes any other state or territory, organized or unorganized, of the United States of America.
(CL '48, § 780.1.)

§ 28.1285(2) **Fugitives from other states; duty of governor, arrest, delivery.** Sec. 2. Subject to the provisions of this act, the provisions of the constitution of the United States controlling, and any and all acts of congress enacted in pursuance thereof, it is the duty of the governor of this state to have arrested and delivered up to the executive authority of any other state of the United States any person charged in that state with treason, felony, or other crime, who has fled from justice and is found in this state.
(CL '48, § 780.2.)

§ 28.1285(3) **Form of demand.** Sec. 3. No demand for extradition of a person charged with a crime in another state shall be recognized by the governor unless in writing, accompanied by the following papers:

EXHIBIT A

(1) Governor's requisition under the seal of the state;

(2) Prosecutor's application for requisition for the return of a person charged with crime, wherein shall be stated:

(a) The name of the person so charged;

(b) The nature of the crime;

(c) The approximate time, place and circumstances of its commission;

(d) That the accused was present in demanding state at the time of commission of alleged crime;

(e) That he thereafter fled from the state;

(f) The state in which he is believed to be, including the location of the accused therein, at the time the application is made; certifying that, in the opinion of the said prosecuting attorney, the ends of justice require the arrest and return of the accused to the demanding state for trial, and that the proceeding is not instituted to enforce a private claim;

(3) Verification by affidavit of said application, which shall be accompanied by certified copies of the indictment returned, or information and affidavit filed, or of the complaint made to the judge or magistrate, and the warrant issued thereupon, stating the offense with which the accused is charged, or of the judgment of conviction or of a sentence imposed in execution thereof, together with a statement by executive authority of the demanding state that the person claimed has escaped from confinement or has broken the terms of his bail, probation or parole. Affidavits or documents as the prosecutor may deem proper may be submitted with such application;

(4) Executive warrant, under the seal of the state, authorizing agent, therein named, to receive the person demanded;

(5) The indictment, information, or affidavit made before the magistrate must substantially charge the person demanded with having committed a crime under the law of that state; and the copy of indictment, information, affidavit, judgment or conviction or sentence must be authenticated by the executive authority making the demand.

(CL '48, § 780.3.)

§ 28.1285(3½) Extradition of person not in demanding state when crime was committed. Sec. 3a. The governor of this state may also surrender, on demand of the executive authority of any other state, any person in this state charged in such other state in the manner provided in section 3 with committing an act in this state, or in a third state, intentionally resulting in a crime in the state whose executive authority is making the demand, and the provisions of this act not otherwise inconsistent shall apply to such cases, even though the accused was not in that state at the time of the commission of the crime, and has not fled therefrom, and the requirements contained in subdivisions (d) and (e) of section 3 of this act shall not apply to such cases ◆.

(CL '48, § 780.3a.)

§ 28.1285(4) Investigation by governor. Sec. 4. When a demand shall be made upon the governor of this state by the executive authority of another state for the surrender of a person so charged with crime, the governor may call upon the attorney general or any prosecuting officer in this state to investigate or assist in investigating the demand, and to report to him the situation and circumstances of the person so demanded, and whether he ought to be surrendered.

(CL '48, § 780.4.)

§ 28.1285(5) Extradition and rendition of persons imprisoned or awaiting trial in another state or who have left the demanding state under compulsion. Sec. 5. When it is desired to have returned to this state a person charged in this state with a crime, and such person is imprisoned or is held under criminal proceedings then pending against him in another state, the governor of this state may agree with the executive authority of such other state for the extradition of such person before the conclusion of such proceedings or his term of sentence in such other state, upon condition that such person be returned to such other state at the expense of this state as soon as the prosecution in this state is terminated.

The governor of this state may also surrender on demand of the executive authority of any other state any person in this state who is charged in the manner provided in section twenty-two [22] of this act with having violated the laws of the state whose executive authority is making the demand, even though such person left the demanding state involuntarily.

(CL '48, § 780.5.)

§ 28.1295(6) Governor's warrant; recitals. Sec. 6. If the governor decides that the demand should be complied with, he shall sign a warrant of arrest, which shall be sealed with the state seal, and be directed to any peace officer or other person whom he may think fit to entrust with the execution thereof. The warrant must substantially recite the facts necessary to the validity of its issuance.

(CL '48, § 780.6.)

§ 28.1285(7) Same; manner and place of execution. Sec. 7. Such warrant shall authorize the peace officer or other person to whom directed to arrest the accused at any time and any place where he may be found within the state and to command the aid of all peace officers or other persons in the execution of the warrant, and to deliver the accused, subject to the provisions of this act to the duly authorized agent of the demanding state.

(CL '48, § 780.7.)

§ 28.1285(8) Authority of arresting officer. Sec. 8. Every such peace officer or other person empowered to make the arrest, shall have the same authority, in arresting the accused, to command assistance therein, as peace officers have by law in the execution of any criminal process directed to them, with like penalties against those who refuse their assistance.

(CL '48, § 780.8.)

§ 28.1285(9) Rights of accused persons; application for writ of habeas corpus. Sec. 9. No person arrested upon such warrant shall be delivered over to the agent whom the executive authority demanding him shall have appointed to receive him unless he shall first be taken forthwith before a judge of a court of record in this state, who shall inform him of the demand made for his surrender and of the crime with which he is charged, and that he has the right to demand and procure legal counsel; and if the prisoner or his counsel shall state that he or they desire to test the legality of his arrest, the judge of such court of record shall fix a reasonable time to be allowed him within which to apply for a writ of habeas corpus. When such writ is applied for, notice thereof, and of the time and place of hearing thereon, shall be given to the prosecuting officer of the county in which the arrest is made and in which the accused is in custody, and to the said agent of the demanding state.

(CL '48, § 780.9.)

§ 28.1285(10) Same; violations by officers, penalty. Sec. 10. Any officer who shall deliver to the agent for extradition of the demanding state a person in his custody under the governor's warrant, in wilful disobedience to the last section, shall be guilty of a misdemeanor and, on conviction, shall be fined, not more than one thousand [1,000] dollars or be imprisoned not

more than six [6] months, or both.

(CL '48, § 780.10.)

§ 28.1285(11) Same; confinement in local jail, expense; fugitives being transported through state, confinement; new requisition. Sec. 11. The offiicer or persons executing the governor's warrant of arrest, or the agent of the demanding state to whom the prisoner may have been delivered, may, when necessary, confine the prisoner in the jail of any county or city through which he may pass; and the keeper of such jail must receive and safely keep the prisoner until the officer or person having charge of him is ready to proceed on his route, such officer or person being chargeable with the expense of keeping.

The officer or agent of a demanding state to whom a prisoner may have been delivered following extradition proceedings in another state, or to whom a prisoner may have been delivered after waiving extradition in such other state, and who is passing through this state with such a prisoner for the purpose of immediately returning such prisoner to the demanding state may, when necessary, confine the prisoner in the jail of any county or city through which he may pass; and the keeper of such jail must receive and safely keep the prisoner until the officer or agent having charge of him is ready to proceed on his route, such officer or agent, however, being chargeable with the expense of keeping: Provided, however, That such officer or agent shall produce and show to the keeper of such jail satisfactory written evidence of the fact that he is actually transporting such prisoner to the demanding state after a requisition by the executive authority of such demanding state. Such prisoner shall not be entitled to demand a new requisition while in this state.

(CL '48, § 780.11.)

§ 28.1285(12) Fugitives from other states; arrest prior to requisition; warrant, contents. Sec. 12. Whenever any person within this state shall be charged on the oath of any credible person before any judge or magistrate of this state with the commission of any crime in any other state and except in cases arising under section 3a, with having fled from justice, or with having been convicted of a crime in that state and having escaped from confinement, or having broken the terms of his bail, probation or parole, or whenever complaint shall have been made before any judge or magistrate in this state setting forth on the affidavit of any credible person in another state that a crime has been committed in such other state and that the accused has been charged in such state with the commission of the crime, and, except in cases arising under section 3a, has fled from justice, or with having been convicted of a crime in that state and having escaped from confinement, or having broken the terms of his bail, probation or parole, and is believed to be in this state, the judge or magistrate shall issue a warrant directed to any peace officer commanding him to apprehend the person named therein, wherever he may be found in this state, and to bring him before the same or any other judge, magistrate or court who or which may be available in or convenient of access to the place where the arrest may be made, to answer the charge or complaint and affidavit, and a certified copy of the sworn charge or complaint and affidavit upon which the warrant is issued shall be attached to the warrant.

(CL '48, § 780.12.)

§ 28.1285(13) Same; felons, arrest without a warrant, procedure. Sec. 13. The arrest of a person may be lawfully made also by any peace officer without a warrant upon reasonable information that the accused stands charged in the courts of a state with a crime punishable by death or imprisonment for a term exceeding one (1) year, but when so arrested the accused must be taken before a judge or magistrate with all practicable speed and complaint must be made against him under oath setting forth the ground for the arrest as in the preceding section; and thereafter his answer shall be heard as if

he had been arrested on a warrant.

(CL '48, § 780.13.)

§ 28.1285(14) Same; commitment to await requisition; bail. Sec. 14. If from the examination before the judge or magistrate it appears that the person held is the person charged with having committed the crime alleged, and, except in cases arising under section 3a, that he has fled from justice, the judge or magistrate must, by a warrant reciting the accusation, commit him to the county jail for such a time not exceeding 30 days and specified in the warrant, as will enable the arrest of the accused to be made under a warrant of the governor on a requisition of the executive authority of the state having jurisdiction of the offense, unless the accused give bail as provided in the next section, or until he shall be legally discharged.

(CL '48, § 780.14.)

§ 28.1285(15) Same, bail; type of cases; condition of bond. Sec. 15. Unless the offense with which the prisoner is charged is shown to be an offense punishable by death or life imprisonment under the laws of the state in which it was committed, a judge or magistrate in this state may admit the person arrested to bail by bond, with sufficient sureties, and in such sum as he deems proper, conditioned for his appearance before him at a time specified in such bond, and for his surrender, to be arrested upon the warrant of the governor of this state.

(CL '48, § 780.15.)

§ 28.1285(16) Same; extension of time of commitment; adjournment. Sec. 16. If the accused is not arrested under warrant of the governor by the expiration of the time specified in the warrant or bond, a judge or magistrate may discharge him or may recommit him for a further period not to exceed sixty (60) days, or a judge or magistrate judge may again take bail for his appearance and surrender, as provided in section

fifteen (15), but within a period not to exceed sixty (60) days after the date of such new bond.

(CL '48, § 780.16.)

§ 28.1285(17) Same; forfeiture of bail; rearrest order; recovery on bond. Sec. 17. If the prisoner is admitted to bail, and fails to appear and surrender himself according to the conditions of his bond, the judge, or magistrate by proper order, shall declare the bond forfeited and order his immediate arrest without warrant if he be within this state. Recovery may be had on such bond in the name of the state as in the case of other bonds given by the accused in criminal proceedings within this state.

(CL '48, § 780.17.)

§ 28.1285(18) Persons under criminal prosecution in this state at time of requisition; discretion of governor. Sec. 18. If a criminal prosecution has been instituted against such person under the laws of this state and is still pending, the governor, in his discretion, either may surrender him on demand of the executive authority of another state or hold him until he has been tried and discharged or convicted and punished in this state.

(CL '48, § 780.18.)

§ 28.1285(19) Guilt or innocence of accused, when inquired into. Sec. 19. The guilt or innocence of the accused as to the crime of which he is charged may not be inquired into by the governor or in any proceeding after the demand for extradition accompanied by a charge of crime in legal form as above provided shall have been presented to the governor, except as it may be involved in identifying the person held as the person charged with the crime.

(CL '48, § 780.19.)

§ 28.1285(20) Governor may recall warrant or issue alias. Sec. 20. The governor may recall his warrant of arrest or may issue another warrant whenever he deems proper.

(CL '48, § 780.20.)

§ 28.1285(21) Fugitives from this state; warrant of governor; form. Sec. 21. Whenever the governor of this state shall demand a person charged with crime or with escaping from confinement or breaking the terms of his bail, probation or parole in this state, from the executive authority of any other state, or from the chief justice or an associate justice of the supreme court of the District of Columbia authorized to receive such demand under the laws of the United States, he shall issue a warrant under the seal of this state, to some agent, commanding him to receive the person so charged if delivered to him and convey him to the proper officer of the county in this state in which the offense was committed.

(CL '48, § 780.21.)

§ 28.1285(22) Same; application for issuance of requisition; execution by officer; form and contents, disposition. Sec. 22. 1. When the return to this state of a person charged with crime in this state is required, the prosecuting attorney shall present to the governor his written application for a requisition for the return of the person charged, in which application shall be stated the name of the person so charged, the crime charged against him, the approximate time, place and circumstances of its commission, the state in which he is believed to be, including the location of the accused therein, at the time the application is made and certifying that, in the opinion of the said prosecuting attorney the ends of justice require the arrest and return of the accused to this state for trial and that the proceeding is not instituted to enforce a private claim.

2. When the return to this state is required of a person who has been convicted of a crime in this state and has escaped from confinement or broken the terms of his bail, probation

or parole, the prosecuting attorney of the county in which the offense was committed, the parole board, or the warden of the institution or sheriff of the county, from which escape was made, shall present to the governor a written application for a requisition for the return of such person, in which application shall be stated the name of the person, the crime of which he was convicted, the circumstances of his escape from confinement or of the breach of the terms of his bail, probation or parole, the state in which he is belived to be, including the location of the person therein at the time application is made.

3. The application shall be verified by affidavit, shall be executed in duplicate and shall be accompanied by two certified copies of the indictment returned, or information and affidavit filed, or of the complaint made to the judge or magistrate, stating the offense with which the accused is charged, or of the judgment of conviction or of the sentence. The prosecuting officer, parole board, warden or sheriff may also attach such further affidavits and other documents in duplicate as he or they shall deem proper to be submitted with such application. One (1) copy of the application, with the action of the governor indicated by endorsement thereon, and one (1) of the certified copies of the indictment, complaint, information, and affidavits, or of the judgment of conviction or of the sentence shall be filed in the office of the secretary of state to remain of record in that office. The other copies of all papers shall be forwarded with the governor's requisition.

(CL '48, § 780.22.)

§ 28.1285(23) Same; costs and expenses. Sec. 23. In all extradition cases the expenses therefor shall be paid out of the county treasury in the county wherein the crime is alleged to have been committed. The expenses shall be the fees paid to the officers of the state on whose governor the requisition is made, and all other necessary and reasonable expenses in returning such prisoner.

(CL '48, § 780.23.)

§ 28.1285(24) Same; immunity from service of process in certain civil actions. Sec. 24. A person brought into this state by, or after waiver of, extradition based on a criminal charge shall not be subject to service of personal process in civil actions arising out of the same facts as the criminal proceedings to answer which he is being or has been returned, until he has been convicted in the criminal proceeding, or, if acquitted, until he has had reasonable opportunity to return to the state from which he was extradited.

(CL '48, §780.24.)

§ 28.1285(25) Written waiver of extradition proceedings. Sec. 25. Any person arrested in this state charged with having committed any crime in another state or alleged to have escaped from confinement, or broken the terms of his bail, probation or parole may waive the issuance and service of the warrant provided for in sections six [6] and seven [7] and all other procedure incidental to extradition proceedings, by executing or subscribing in the presence of a judge of any court of record within this state a writing which states that he consents to return to the demanding state: Provided, however, That before such waiver shall be executed or subscribed by such person it shall be the duty of such judge to inform such person of his rights to the issuance and service of a warrant of extradition and to obtain a writ of habeas corpus as provided for in section nine [9].

If and when such consent has been duly executed it shall forthwith be forwarded to the office of the governor of this state and filed therein. The judge shall direct the officer having such person in custody to deliver forthwith such person to the duly accredited agent or agents of the demanding state, and shall deliver or cause to be delivered to such agent or agents a copy of such consent.

(CL '48, § 780.25.)

§ 28.1285(26) Non-waiver by this state. Sec. 26. Nothing

in this act contained shall be deemed to constitute a waiver by this state of its right, power or privilege to try such demanded person for crime committed within this state, or of its right, power or privilege to regain custody of such person by extradition proceedings or otherwise for the purpose of trial, sentence or punishment for any crime committed within this state, nor shall any proceedings had under this act which result in, or fail to result in, extradition be deemed a waiver by this state of any of its rights, privileges or jurisdiction in any way whatsoever.

(CL '48, § 780.26.)

§ 28.1285(27) Person extradited not immune from other criminal prosecution. Sec. 27. After a person has been brought back to this state by, or after waiver of extradition proceedings, he may be tried in this state for other crimes which he may be charged with having committed here as well as that specified in the requisition for his extradition.

(CL '48, § 780.27.)

§ 28.1285(28) Interpretation. Sec. 28. The provisions of this act shall be so interpreted and construed as to effectuate its general purposes to make uniform the law of those states which enact it.

(CL '48, § 780.28.)

§§ 28.1285(29), 28.1285(30) (Repealed by Pub Acts 1945, No. 267, imd eff May 25. These sections contained a severing clause and a repeal provision.)

§ 28.1285(31) Short title. Sec. 31. This act may be cited as the "uniform criminal extradition act".

(CL '48, § 780.31.)

ARIZONA UNIFORM CRIMINAL EXTRADITION ACT

§ 13—1301. Definitions

In this article, unless the context otherwise requires:

1. "Governor" includes any person performing the functions of governor by authority of the law of this state.

2. "Executive authority" includes the governor, and any person performing the functions of governor in a state other than this state.

3. "State," when referring to a state other than this state, means any other state or territory, organized or unorganized, of the United States.

§ 13—1302. Fugitives from justice; duty of governor

Subject to the provisions of this article, the provisions of the constitution of the United States controlling, and any and all acts of Congress enacted in pursuance thereof, it is the duty of the governor of this state to have arrested and delivered up to the executive authority of any other state of the United States any person charged in that state with treason, felony, or other crime, who has fled from justice and is found in this state.

§ 13—1303. Form of demand

A. No demand for the extradition of a person charged with crime in another state shall be recognized by the governor unless in writing and accompanied by a copy of an indictment found or by an information supported by affidavit in the state having jurisdiction of the crime, or by a copy of an affidavit made before a magistrate there.

B. The indictment, information, or affidavit made before

the magistrate must substantially charge the person demanded with having committed a crime under the law of that state, and the copy must be authenticated by the executive authority making the demand, which shall be prima facie evidence of its truth.

§ 13—1304. Governor may investigate case

When a demand shall be made upon the governor of this state by the executive authority of another state for the surrender of a person so charged with crime, the governor may call upon the attorney general or any prosecuting officer in this state to investigate or assist in investigating the demand, and to report to him the situation and circumstances of the person so demanded, and whether he ought to be surrendered.

§ 13—1305. What papers must show

A warrant of extradition shall not be issued unless the documents presented by the executive authority making the demand show that:

1. Except in cases arising under § 13—1306, the accused was present in the demanding state at the time of the commission of the alleged crime, and thereafter fled from the state;

2. The accused is now in this state, and

3. Is lawfully charged by indictment found or by information filed by a prosecuting officer and supported by affidavit to the facts, or by affidavit made before a magistrate in that state, with having committed a crime under the laws of that state, or that he has been convicted of a crime in that state and has escaped from confinement or broken his parole.

§ 13—1306. Extradition of persons not present in demanding state at time of commission of crime

The governor of this state may also surrender, on demand

of the executive authority of any other state, any person in this state charged in such other state in the manner provided in § 13—1305 with committing an act in this state, or in a third state, intentionally resulting in a crime in the state whose executive authority is making the demand, and the provisions of this article not otherwise inconsistent, shall apply to such cases, even though the accused was not in that state at the time of the commission of the crime, and has not fled therefrom.

§ 13—1307. Issue of governor's warrant of arrest; its recital

If the governor decides that the demand should be complied with, he shall sign a warrant of arrest, which shall be sealed with the state seal, and be directed to any peace officer or other person whom he may think fit to entrust with the execution thereof. The warrant must substantially recite the facts necessary to the validity of its issuance.

§ 13—1308. Manner and place of execution

Such warrant shall authorize the peace officer or other person to whom directed to arrest the accused at any time and any place where he may be found within the state and to command the aid of all peace officers or other persons in the execution of the warrant, and to deliver the accused, subject to the provisions of this article, to the duly authorized agent of the demanding state.

§ 13—1309. Authority of arresting officer

Every such peace officer or other person empowered to make the arrest, shall have the same authority, in arresting the accused, to command assistance therein, as peace officers have by law in the execution of any criminal process directed to them, with like penalties against those who refuse their assistance.

§ 13—1310. Duty of arresting officer; application for writ of habeas corpus; notice

A. No person arrested upon such warrant shall be delivered over to the agent whom the executive authority demanding him shall have appointed to receive him unless he has been informed of the demand made for his surrender and of the crime with which he is charged, and that he has the right to demand legal counsel; and if the prisoner, his friends, or counsel shall state that he or they desire to test the legality of his arrest, the prisoner shall be taken forthwith before a judge of a court of record, who shall fix a reasonable time to be allowed him within which to apply for a writ of habeas corpus. When such writ is applied for, notice thereof, and of the time and place of hearing thereon, shall be given to the public prosecuting officer of the county in which the arrest is made and in which the accused is in custody, and to the said agent of the demanding state.

§ 13—1311. Penalty for noncompliance with preceding section

Any officer who shall deliver to the agent for extradition of the demanding state a person in his custody under the governor's warrant in disobedience to § 13—1310, shall be guilty of a misdemeanor and, on conviction, shall be fined not more than one thousand dollars, imprisoned not more than six months, or both.

§ 13—1312. Confinement in jail when necessary

The officer or persons executing the governor's warrant of arrest, or the agent of the demanding state to whom the prisoner may have been delivered may, when necessary, confine the prisoner in the jail of any county or city through which he may pass; and the keeper of such jail must receive and safely keep the prisoner until the officer or person having charge of him is ready to proceed on his route, such officer or person being chargeable with the expense of keeping.

§ 13—1313. Arrest prior to requisition

When any person within this state shall be charged on the oath of any credible person before any judge or magistrate of this state with the commission of any crime in any other state, and, except in cases arising under § 13—1306, with having fled from justice, or whenever complaint shall have been made before any judge or magistrate of this state setting forth on the affidavit of any credible person in another state that a crime has been committed in such other state and that the accused has been charged in such state with the commission of the crime, and, except in cases arising under § 13—1306, has fled therefrom and is believed to be in this state, the judge or magistrate shall issue a warrant directed to the sheriff of the county in which the oath or complaint is filed directing him to apprehend the person charged, wherever he may be found in this state, and bring him before the same or any other judge, magistrate, or court who or which may be convenient of access to the place where the arrest may be made, to answer the charge or complaint and affidavit, and a certified copy of the sworn charge or complaint and affidavit upon which the warrant is issued shall be attached to the warrant.

§ 13—1314. Arrest without a warrant

The arrest of a person may be lawfully made also by any peace officer or a private citizen without a warrant upon reasonable information that the accused stands charged in the courts of another state with a crime punishable by death or imprisonment for a term exceeding one year, but when so arrested the accused must be taken before a judge or magistrate with all practicable speed and complaint must be made against him under oath setting forth the ground for the arrest as in § 13—1313, and thereafter his answer shall be heard as if he had been arrested on a warrant.

§ 13—1315. Commitment to await requisition; bail

If from the examination before the judge or magistrate it appears that the person held is the person charged with having committed the crime alleged and that he probably committed the crime, and, except in cases arising under § 13—1306, that he has fled from justice, the judge or magistrate must commit him to jail by a warrant reciting the accusation for such a time specified in the warrant, not exceeding fifteen days, as will enable the arrest of the accused to be made under a warrant of the governor on a requisition of the executive authority of the state having jurisdiction of the offense, unless the accused give bail as provided in § 13—1316, or until he shall be legally discharged.

§ 13—1316. Bail; in what cases; conditions of bond

Unless the offense with which the prisoner is charged is shown to be a capital offense, where the proof is evident or the presumption great, under the laws of the state in which it was committed, a judge or magistrate in this state must admit the person arrested to bail or bond or undertaking, with sufficient sureties, and in such sum as he deems proper, conditioned for his appearance before him at a time specified in such bond or undertaking, and for his surrender, to be arrested upon the warrant of the governor.

§ 13—1317. If no arrest made on governor's warrant before the time specified

If the accused is not arrested under warrant of the governor by the expiration of the time specified in the warrant, bond, or undertaking, the judge or magistrate may discharge him or may recommit him to a further day, or may again take bail for his appearance and surrender as provided in § 13—1306; and at the expiration of the second period of commitment, or if he has been bailed and appeared according to the terms of his bond or undertaking, the judge or magistrate may either discharge

him, or may require him to enter into a new bond or undertaking, to appear and surrender himself at another day.

§ 13—1318. Forfeiture of bail

If the prisoner is admitted to bail, and fails to appear and surrender himself according to the conditions of his bond, the court, by proper order, shall declare the bond forfeited; and recovery may be had thereon in the name of the state as in the case of other bonds or undertaking given by the accused in criminal proceedings within this state.

§ 13—1319. Persons under criminal prosecution in this state at time of requisition

If a criminal prosecution has been instituted against such person under the laws of this state and is still pending the governor, at his discretion, either may surrender him on demand of the executive authority of another state or may hold him until he has been tried and discharged or convicted and punished in this state.

§ 13—1320. Guilt or innocence of accused; when inquired into

The guilt or innocence of the accused as to the crime of which he is charged may not be inquired into by the governor or in any proceeding after the demand for extradition accompanied by a charge of crime in legal form as provided by this article shall have been presented to the governor, except as it may be involved in identifying the person held as the person charged with the crime.

§ 13—1321. Governor may recall warrant or issue alias

The governor may recall his warrant of arrest, or may issue another warrant whenever he deems proper.

§ 13—1322. Fugitives from this state; duty of governors

Whenever the governor of this state shall demand a person charged with crime in this state, from the executive authority of any other state, or from the chief justice or an associate justice of the supreme court of the District of Columbia authorized to receive such demand under the laws of the United States, he shall issue a warrant under the seal of this state, to some agent, commanding him to receive the person so charged if delivered to him and convey him to the proper officer of the county in this state in which the offense was committed.

§ 13—1323. Application for issuance of requisition; by whom made; contents

When the return to this state of a person charged with crime in this state is required, the county attorney of the county in which the offense is committed shall present to the governor his written application for a requisition for the return of the person charged, in which application shall be stated the name of the person so charged, the crime charged against him, and the state in which he is believed to be, including the location of the accused therein at the time the application is made and certifying that, in the opinion of the county attorney the ends of justice require the arrest and return of the accused to this state for trial and that the proceeding is not instituted to enforce a private claim. The application shall be verified by affidavit, shall be executed in duplicate and shall be accompanied by two certified copies of the indictment returned, or information and affidavit filed, or of the complaint made to the judge or magistrate, stating the offense with which the accused is charged. The county attorney may also attach such further affidavits and other documents in duplicate as he shall deem proper to be submitted with such application. One copy of the application, with the action of the governor indicated by endorsement thereon, and one of the certified copies of the indictment, complaint, information, and affidavits, shall be filed in the office of the secretary of state to remain of record in that

office. The other copies of all papers shall be forwarded with the governor's requisition.

§ 13—1324. Payment of account of agent; method as exclusive; penalty for violation by agent or person

A. When the governor of this state, in the exercise of the authority conferred by law, demands from the executive authority of any other state or foreign country the surrender to the authorities of this state of a fugitive from justice, the accounts of the persons employed by him for that purpose shall be paid by the county in which the offense was committed upon presentation of the account to the board of supervisors. Should the board of supervisors neglect to pay the claim within thirty days after its presentation, the superior court may, upon petition filed in such court, order the payment of the claim.

B. No compensation, fee or reward shall be paid to or received by a public officer of this state, or other person, for a service rendered in procuring from the governor the demand, the surrender of the fugitive, conveying the fugitive to this state, or detaining him therein, except as provided in this section, and any person receiving or accepting such compensation, fee or reward in violation of the provisions of this section is guilty of a misdemeanor.

§ 13—1325. Exemption from civil process

A person brought into this state on extradition based on a criminal charge shall not be subject to service of personal process in civil actions arising out of the same facts as the criminal proceedings to answer which he is returned, until he has been convicted in the criminal proceeding, or, if acquitted, until he has had ample opportunity to return to the state from which he was extradited.

§ 13—1326. No right of asylum

After a person has been brought back to this state upon

extradition proceedings, he may be tried in this state for other crimes which he may be charged with having committed here as well as that specified in the requisition for his extradition.

§ 13—1327. Interpretation

The provisions of this article shall be so interpeted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.

§ 13—1328. Short title

This article may be cited as the uniform criminal extradition act.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1202

STATE OF MICHIGAN,

Petitioner,

v.

HAROLD W. DORAN,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF MICHIGAN

BRIEF FOR THE RESPONDENT

STATE APPELLATE DEFENDER
OFFICE

KATHLEEN M. CUMMINS
Assistant Defender
Third Floor, North Tower
1200 6th Avenue
Detroit, Michigan 48226
256-2814

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Page

CASES:

UNITED STATES STATUTES AND CONSTITUTIONAL PROVISIONS:

STATE STATUTES AND RULES:

SECONDARY AUTHORITIES:

MISCELLANEOUS:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1202

STATE OF MICHIGAN,

Petitioner,

v.

HAROLD W. DORAN,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF MICHIGAN

BRIEF FOR THE RESPONDENT

COUNTERSTATEMENT OF THE QUESTION PRESENTED

THE MICHIGAN SUPREME COURT DID NOT MISCONSTRUE THE FOURTH AMENDMENT AND THE EXTRADITION CLAUSE BY HOLDING THAT THE SCOPE OF A HABEAS CORPUS CHALLENGE TO EXTRADITION LEGITIMATELY ENCOMPASSES A SCRUTINY BY THE ASYLUM JURISDICTION OF THE CHARGING DOCUMENTS SUPPORTING THE DEMANDING STATE'S

REQUISITION TO DETERMINE WHETHER SUCH DOCUMENTS FACIALLY REFLECT PROBABLE CAUSE AND HENCE SUBSTANTIALLY CHARGE THE ACCUSED FUGITIVE WITH CRIME.

COUNTERSTATEMENT OF THE CASE

On December 18, 1975, Harold William Doran, returning from Arizona, was arrested in Bay City, Bay County, Michigan and charged with receiving and concealing stolen property. MCLA 750.535; MSA 28.803. The charge was based on Mr. Doran's possession of the truck in which he had driven to Michigan from Arizona. Immediately after his arrest, the Bay City police notified authorities in Maricopa County (Phoenix) Arizona. Soon thereafter, a photograph of Mr. Doran, dated December 18, 1975, was forwarded to the Phoenix Police Department (A 29). On January 7, 1976, a Phoenix justice of the peace issued a warrant seeking Mr. Doran for theft of a motor vehicle or alternatively, theft by embezzlement. ARS 13-672(A), 13-1645, 13-661-13-663, 13-671(A); ARS 13-682, 13-688 (A 26). The warrant was issued on the strength of a complaint by a Phoenix police officer. The "date of offense" alleged in the warrant and complaint was December 18, 1975, the date of Mr. Doran's arrest in Bay County. On or about April 26, 1976, the Phoenix authorities amended the date of offense by photocopying the original complaint and warrant, scoring out "December 18, 1975" and writing in "December 3", 1975. The amended complaint and warrant were sent to the Bay County Prosecutor, but not to the governors of Arizona or

Michigan. The Arizona executive had already on February 11, 1976 forwarded a requisition to Michigan for the rendition of Mr. Doran. Attached to the requisition were the original complaint and warrant (A 24-26) and two supporting affidavits by a police officer, both of which postdated the complaint and warrant by almost a month (A 27-28).

By this time, Bay County was holding Mr. Doran solely as a fugitive, (A 30-31) since the Michigan receiving and concealing charge had been "nolle prossed" in deference to the extradition proceedings. The Michigan Governor's warrant issued March 22, 1976.

Mr. Doran twice petitioned the arraigning court for a writ of *habeas corpus.* Both writs were successively denied by that Court after hearings held April 8 and 9, 1976, and August 10 and 13, 1976. After failing to obtain relief on either petition in the Michigan Court of Appeals, Appellee applied to the Michigan Supreme Court which granted leave to appeal November 1, 1976.

On October 4, 1977, the Michigan Supreme Court reversed the Bay County Circuit Court and ordered Mr. Doran's immediate release. *In the Matter of Doran (People v. Doran),* 401 Mich. 235; 258 N.W. 2d 406 (1977). By this date, Mr. Doran had been incarcerated in the Bay County jail almost two years, the trial and appellate courts having refused his repeated requests to set bond.

After unsuccessfully applying for rehearing, the Michigan Attorney General petitioned this Court for certiorari which was granted April 17, 1978. Petitioner's Brief was received by Counsel for Respondent on June 30, 1978. Respondent now files his Brief on Appeal.

ARGUMENT

I.

THE STATE OF MICHIGAN HAS THE RIGHT AND DUTY TO REFUSE TO EXTRADITE AN ACCUSED FUGITIVE ON THE BASIS OF A MERE CHARGE IF THE CHARGING DOCUMENTS TENDERED BY THE DEMANDING STATE DO NOT FACIALLY REFLECT AND SUPPORT A JUDICIAL FINDING OF PROBABLE CAUSE WITHIN THE MEANING OF THE FOURTH AMENDMENT.

In *In the Matter of Doran (People v. Doran)*, 401 Mich. 235; 258 N.W. 2d 406 (1977), the Michigan Supreme Court determined that:

> "Michigan may not arrest, detain and render to the demanding state a person accused of a crime unless that state submits an indictment or a judicial determination of probable cause or adequate factual affidavit(s) reflecting probable cause.
>
> "Where there has been no indictment or judicial determination of probable cause in the demanding state, a requirement that the demanding state's affidavit set forth facts which support a determination of probable cause safeguards citizens and other persons found in the asylum state against abuse of the extradition process." *In the Matter of Doran*, 401 Mich. at 250.

The Attorney General argues that this holding misconstrues the Fourth Amendment and conflicts with the purpose of the Extradition Clause. Neither of these arguments have merit.

A. A State has a right and duty to protect its inhabitants from unreasonable intrusions upon their persons or property.

The Fourth Amendment protects against unfounded invasions of liberty and privacy. *Gerstein v. Pugh*, 420 U.S. 103, 112; 95 S. Ct. 854; 43 L.Ed.2d 54 (1975). *Wolf v. People of State of Colorado*, 338 U.S. 25; 69 S. Ct. 1359; 93 L.Ed. 1782 (1949) made the Fourth Amendment applicable to the states through the Fourteenth Amendment, and *Mapp v. Ohio*, 367 U.S. 643; 81 S. Ct. 1684; 6 L.Ed.2d 1081 (1961) made it enforceable against them by the same sanctions and by application of the same constitutional standards as prohibit unreasonable Federal intrusions into the security and privacy of individuals.

In *Ker v. California*, 374 U.S. 23, 32; 83 S. Ct. 1623; 10 L.Ed.2d 726 (1963), this Court emphasized that implicit in the Fourth Amendment protection from unreasonable searches and seizures is its recognition of individual freedom. "That safeguard has been declared to be 'as of the very essence of constitutional liberty,' the guaranty of which 'is as important and as imperative as are the guaranties of the other fundamental rights of the individual citizen.' " In *Ker, supra* and *Mapp, supra*, this Court made clear that governmental invasions of personal liberty must be reasonable.

The statutory extradition process is a right conferred upon the asylum state whereby, as a sovereign, it may assert its prerogative to protect its own citizens or persons within its boundaries from unjust criminal actions that may be brought by a sister state. See *State ex rel Niederer v. Cady*, 72 Wis. 2d 311; 240 N.W. 2d 626 (1976). Thus, the state of Michigan had the right to measure the proposed

extradition of Mr. Doran against Fourth Amendment standards of reasonableness.

B. Wherever possible, a serious invasion of liberty must be preceded by an independent determination of probable cause made by a neutral and detached magistrate.

To implement the Fourth Amendment's protection against unfounded and unreasonable invasions of liberty and privacy, this Court "has required that the existence of probable cause be decided by a neutral and detached magistrate whenever possible." *Gerstein v. Pugh,* supra, 420 U.S. at 112. Whether the intrusion is an arrest or a search and seizure of premises and property, this Court has required that it be justified by a showing of probable cause which exists where

> "the facts and circumstances within their [the officer's] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed."

Brinegar v. United States, 338 U.S. 160, 175; 69 S. Ct. 1302; 93 L.Ed. 1879 (1949). Unless the exigencies of legitimate law enforcement dictate otherwise, *Gerstein v. Pugh, supra,* 420 U.S. 113, the Fourth Amendment requirement of reasonableness entails that arrests or searches be preceded by the issuance of a warrant by a neutral and detached magistrate who has found probable cause based on a complaint or affidavit containing independent factual support for this finding. *Giordenello v. United States,* 357 U.S. 480; 78 S. Ct. 1245; 2 L.Ed.2d

1503 (1958); *Aguilar v. Texas,* 378 U.S. 108; 84 S. Ct. 1509; 12 L.Ed.2d 723 (1964). The complaint or affidavit underlying the warrant must state sufficient facts to provide an independent basis for the magistrate's conclusion that probable cause exists. *Aguilar, supra.* This "independent basis" safeguard prevents the magistrate from serving "merely as a rubber stamp for the police" *Aguilar,* 378 U.S. at 111, and averts the consequences of overzealous law enforcement:

> "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime."

Johnson v. United States, 333 U.S. 10, 13-14; 68 S. Ct. 367; 92 L.Ed. 436 (1948).

In addition to forming an independent basis for the magistrate's neutral and detached judgment, the complaint normally embodies the only record of information brought to the magistrate's attention at the time the warrant is issued, and thus is the *only* means by which the reviewing court can assess the validity of the probable cause finding. *Giordenello v. United States,* 357 U.S. 480, 486; 78 S. Ct. 1245; 2 L.Ed.2d 1503 (1958). To fulfill both functions an adequate factual demonstration of probable cause must appear on the *face* of the supporting affidavit or complaint. *Giordenello, supra,* 357 U.S. 480, 487. A constitutionally acceptable demonstration of probable cause has been held to require a statement of personal knowledge, or if based on information and belief, an identification of the sources of

that belief and a recitation of sufficient underlying circumstances to support an independent judgment that the belief is probably true. If the sources are not identified, the affiant must disclose "some of the underlying circumstances" from which he concluded that the source was credible or his information reliable. See *Aguilar v. Texas, supra,* 378 U.S. 108, 114; *Giordenello v. United States, supra; Spinelli v. United States,* 393 U.S. 410; 89 S. Ct. 584; 21 L.Ed.2d 637 (1969); *United States v. Ventresca,* 380 U.S. 102, 109; 85 S. Ct. 741; 13 L.Ed.2d 684 (1965); *United States ex rel Grano v. Anderson,* 446 F.2d 272, 275 (CA3, 1971) (Dissenting opinion of Circuit Judge Van Dusen).

C. Extradition is a serious invasion of liberty which must be preceded by a determination of probable cause. This determination must appear on the face of the charging documents supporting the rendition request.

As noted by Appellant, the Michigan Supreme Court's conclusion that a complaint or affidavit in support of a rendition request must reflect probable cause rested squarely on the holding of *Kirkland v. Preston*, 128 U.S. App. D.C. 148; 385 F.2d 670 (1967). Since *Kirkland* is the fountainhead of the trend toward requiring probable cause for extradition arrests, a detailed exposition of its reasoning is necessary.

In *Kirkland,* the petitioners were being held for rendition to Florida. The Florida requisition was supported by charging documents similar to the Arizona documents in the instant case: the affidavit of a Miami police officer, sworn to before a justice of the peace, and an arrest warrant

issued by the same justice of the peace. The police officer's complaint, apart from filling in the date, location and ownership of the premises burnt, used only the statutory charging language for arson:

> "* * * [O]n the 23rd day of July A.D., 1965, in the County and District aforesaid [Dade County] one Oliver Lee Kirkland & Elizabeth Maria Smith DID THEN AND THERE: unlawfully, wilfully, maliciously and feloniously set fire to and burn or cause to be burned a certain building, to wit: The Hut Bar, located at 2280 S.W. 32nd Avenue, City of Miami, Dade County, Florida, a further and more particular description of said bar being to the affiant unknown, the said bar being the property of one Fredrich Ritter."

Kirkland, supra 385 F.2d at 672. Interpreting 62 Stat. 822 (1948); 18 U.S.C. §3182, which permits extradition based upon "an indictment found or an affidavit made before a magistrate. . . , charging the person demanded with having committed treason, felony, or other crime", the Circuit Court, per Judge J. Skelly Wright, held that:

> ". . . for purposes of extradition, the Section 3182 'affidavit' does not succeed in 'charging' a crime unless it sets out facts which justify a Fourth Amendment finding of probable cause." *Kirkland, supra* 385 F.2d at 674.

Crucial to the *Kirkland* holding was the recognition that extradition makes deep inroads upon personal liberty:

> "The law appreciates the hardship which extradition can involve: not only the suspension of one's liberty, but his deportation from the state in which he lives into another jurisdiction which may be hundreds of miles from his home. The law accordingly surrounds the accused with considerable procedural protection to stave off wrongful rendition." *Kirkland, supra,* 676.

This reasoning compelled the conclusion that:

> "There is no reason why the Fourth Amendment, which governs arrests, should not govern extradition arrests. Under its familiar doctrine arrests must be preceded by a finding of probable cause. When an extradition demand is accompanied by an indictment, that document embodies a grand jury's judgment that constitutional probable cause exists. But when the extradition papers rely on a mere affidavit, even where supported by a warrant of arrest, there is no assurance of probable cause unless it is spelled out in the affidavit itself. Thus Fourth Amendment considerations require that before a person can be extradited on a Section 3182 affidavit the authorities in the asylum state must be satisfied that the affidavit shows probable cause." *Kirkland, supra,* 676.

The Michigan Supreme Court is a relative latecomer among the many jurisdictions, state and federal, which have espoused the *Kirkland* rule and rationale. Several courts, notably those of Colorado, New York and Nevada have held that where extradition is sought upon a charge, the requisition must be supported by documents not only indicating a judicial finding of probable cause but reciting on their face sufficient underlying facts to satisfy the governor, or habeas corpus court, that probable cause exists. *Montague v. Smedley*, 557 P.2d 774 (Alaska S. Ct. 1976); *Pippin v. Leach*, 534 P.2d 1193 (Colo., 1975); *Wood v. Leach*, 540 P.2d 1084 (Colo., 1975); *Martinez v. Sheriff of Clark County*, 90 Nev. 371; 527 P.2d 1200 (1974); *Sheriff of Clark County v. Thompson*, 85 Nev. 211; 452 P.2d 911 (1969); *People v. McFall*, 175 Colo. 151; 486 P.2d 6 (1971), clarifying *Hithe v. Nelson*, 172 Colo. 179; 471 P.2d 596 (1970); *Brode v. Power*, 31 Conn. Sup. 412; 332 A.2d 376 (1974); *Tucker v. Commonwealth*

of Virginia, 308 A.2d 783 (D.C. App., 1973); *People ex rel Cooper v. Lombard*, 45 Ap. Div. 2d 928; 357 N.Y.S.2d 323 (1974) (Fourth Department); *People ex rel Gatto v. District Attorney of Richmond County*, 32 Ap. Div.2d 1053; 303 N.Y.S.2d 726 (1969) (Second Department); *People ex rel Porzio v. Wright*, 59 Misc.2d 1056; 301 N.Y.S.2d 668 (1969); *People v. Artis*, 32 Ap. Div.2d 554; 300 N.Y.S.2d 208 (1969) (Second Department); *Application of Evans*, 512 S.W.2d 238 (Mo. App., 1974); *Coca v. Sheriff of Denver*, 184 Colo. 11; 517 P.2d 843 (1974); *Lopez v. Cronin*, 568 P.2d 43, 44 (Colo., 1977); *Jordan v. Cronin*, 554 P.2d 1099 (Colo., 1976); *United States ex rel Mayberry v. Yeager*, 321 F. Supp. 199 (D. New Jersey, 1971); *Wellington v. State of South Dakota*, 413 F. Supp. 151 (S.D. South Dakota, 1976) *reversing Wellington v. State*, 238 N.W.2d 499 (S.D., 1976); *United States ex rel Grano v. Anderson*, 446 F.2d 272 (CA3, 1971).

As do *Kirkland* and *In the Matter of Doran*, these cases scrutinize requisition supporting documents for probable cause only when there is no built in guaranty that a prior probable cause determination has taken place: for example, where extradition is sought upon the basis of a conviction: *Wortham v. State*, 519 P.2d 797 (Alaska S. Ct. 1974); *Wynsma v. Leach*, 536 P.2d 817 (Colo., 1975), an information binding the accused over for trial after a preliminary probable cause hearing, *Christoper v. Cronin*, 564 P.2d 424 (Colo., 1977); *In Re Norma Moore*, 313 N.E. 2d 893 (Mass. App., 1974) or an indictment, which embodies a grand jury's finding of probable cause. *People v. Jackson*, 180 Colo. 135; 502 P.2d 1106 (1972).[1]

[1]There are numerous other variations in the application of Kirkland. For example, some courts have held that the pre-rendition probable

(continued)

Although conceding the great appeal of the proposition that affidavits which charge a crime for extradition purposes should recite sufficient facts to show probable cause, the Illinois Supreme Court declined reluctantly to follow Kirkland. *People ex rel Kubala v. Woods,* 52 Ill.2d 48; 284 N.E. 2d 286 (1972); See also *People v. Jimmie Wade Lauderdale,* 16 Ill. App.3d 916; 306 N.E. 2d 913 (1974).

The Court of Appeals for the First Circuit has also recognized the serious threat to individual liberty posed by extradition. In *Ierardi v. Gunter,* 528 F.2d 929 (CA 1, 1976), the Court upheld the district court in reversing the Supreme Judicial Court of Massachusetts. [*In Re Ierardi,* 321 N.E. 2d 921 (Mass., 1975)] and stated that:

> ". . . we think interstate extradition necessarily involves significant restraint. At best extradition means an extended period of detention, involving custody pending administrative arrangements in two states as well as forced travel in between. At worst it means separation from a familiar jurisdiction and effective denial of the support of family, friends and familiar advisors." *Ierardi v. Gunter, supra,* 930.

In refusing to extradite Ierardi on the basis of a prosecutor-executed information, the First Circuit relied upon *Gerstein v. Pugh,* 420 U.S. 103; 95 S. Ct. 854; 43 L.Ed.2d 54 (1975) in which this Court held that "the Fourth Amendment requires a timely *judicial* determination of probable cause as a prerequisite to "any significant pretrial restraint of liberty." *Gerstein,* 420 U.S. at 125.

(footnote continued from preceding page)
cause requirement is satisfied by a showing of probable cause to believe that the accused is a fugitive from justice. See *Glavin v. Warden,* 163 Conn. 394; 311 A.2d 86 (1972); and most recently *Marshall v. Gedney,* 23 CLR 2117; ___ Pa. ___ ; ___ A.2d ___ (3-23-1978).

From *Kirkland* and *Ierardi* a two-pronged rule can be extrapolated: Before the significant restraint of extradition takes place, charging documents submitted by the demanding state should reflect, *on their face,* sufficient facts to satisfy the asylum executive that probable cause exists for charging the accused fugitive with crime in the demanding state. Moreover, the requisition supporting papers should show that probable cause was determined by a neutral and detached magistrate.

The purpose of requiring facts showing probable cause to be spelled out in the four corners of the affidavit is to permit an independent assessment of probable cause in the asylum state. As was eloquently stated in *Kirkland* at 677:

> "In addition, the interests of the asylum state are advanced by its own probable cause determination. For it would be highhanded to compel that jurisdiction to lend its coercive authority, and the processes of its law, against even its own citizens in aid of an enterprise the key details of which remain in the dark. If, as here, it turns out that the prosecution against the fugitive is unfounded, the asylum state will have expended its resources and given the legitimizing stamp of its judiciary to a cause which is at best futile, at worst arbitrary."

Appellant argues that a determination of probable cause prior to extradition is not necessary since extradition is merely a preliminary step in securing the arrest and detention of the fugitive and that, in any event, he may litigate the question of probable cause upon his return to the demanding state. Such an argument intimates that extradition is a relatively minor intrusion upon personal liberty which, like a stop, does not require the full panoply of Fourth Amendment protection. This claim softpedals the

harsh reality of extradition. The intrusion posed by extradition is equally as disruptive as that posed by a conventional arrest. If anything, extradition particularly when sought on an untried charge, represents a far more grievous encroachment upon personal liberty than an ordinary arrest: not merely incarceration in both states pending extradition and trial, but forced travel to another jurisdiction sometimes, as in this case, over 1,500 miles away from the domicile of the accused. This is a "significant restraint" unto itself, distinct from mere pretrial detention. Where such deprivation is at stake, the reasons for dispensing with the magistrate's neutral judgment evaporate. *Gerstein v. Pugh, supra,* 420 U.S. 114. The fact, as Appellant points out, that *Gerstein v. Pugh* is not an extradition case does not detract from its importance in defining Fourth Amendment prerequisites to extended custody. Because of the unique nature of an extradition arrest, a probable cause determination upon returning to the demanding state comes too late. See: *People v. Sterbins,* 32 Mich. App. 508, 511; 189 N.W. 2d 154 (1971).

D. The issue of probable cause for extradition custody must be litigated, if at all, in the asylum state.

The argument for requiring a probable cause showing prior to extradition cannot be defeated by the bromide that the accused fugitive may resort to his Fourth Amendment remedy upon his return to the demanding state. There *is* no remedy for wrongful extradition once extradition has taken place.

This Court has repeatedly held that the method of a person's rendition, whether by illegal extradition or outright forcible abduction, does not affect the validity of subsequent proceedings in the demanding state and cannot be raised as a collateral issue in the demanding state. As noted in *Pettibone v. Nichols,* 203 U.S. 192, 214; 27 S. Ct. 111; 51 L.Ed. 148 (1906);

> ". . . the act complained of does not relate to the restraint from which the petitioner seeks to be relieved, but to the means by which he was brought within the jurisdiction of the court under whose process he is held."

See also *Ker v. Illinois,* 119 U.S. 436; 7 S. Ct. 225; 30 L.Ed. 421 (1886); *Mahon v. Justice,* 127 U.S. 700; 8 S. Ct. 1204; 32 L.Ed. 283 (1888); *State ex rel Niederer v. Cady,* 72 Wis. 2d 311; 240 N.W. 2d 626, 630 (1976).

In an extradition case, the restraint for which prior probable cause justification is sought is not merely arrest pursuant to the demanding state's warrant but the distinct and equally onerous deprivation of *forced removal* from one state to another. Once the forced travel has taken place, the accused may litigate the validity of the demanding state's hold on him in a probable cause hearing. However, he has no remedy for the forcible removal since it has already taken place. The question is moot.[2]

Thus, extradition presents the anomaly of custodial restraint, serious enough to warrant Fourth Amendment protection but without guaranty of post facto redress if extradition takes place without probable cause. Unlike warrantless arrests and searches, which can be vindicated by

[2]It is for this reason that courts in order to preserve the viability of the issues in extradition appeals, have been forced to stay extradition. See *People ex rel Meeker v. Baker,* 139 Ap. Div. 471 (1910). Extradition was stayed in this case (A 13).

an after-the-fact probable cause hearing or redressed by the imposition of the exclusionary rule, an extradition without probable cause has no remedy except prevention. Courts have so far been unwilling to formulate an exclusionary rule for wrongful extradition. *Boag v. State,* 21 Ariz. App. 404; 520 P.2d 317 (1974). Thus, extradition is one area where, contrary to the Michigan attorney general's blithe assumption, the courts of the demanding state are not empowered to protect the rights of the accused.

If probable cause as a prerequisite to the significant restraint of extradition is, as Appellee insists, a constitutional right, it must have parity with other constitutional rights: that is to say, it must be enforceable. See *Mapp v. Ohio,* 367 U.S. 643; 81 S. Ct. 1684; 6 L.Ed.2d 1081 (1961). The only way to enforce this right is to require that this severe intrusion take place only after a demonstration of probable cause. The logical forum for a determination that the charging papers submitted by the demanding state reflect and factually support a prior judicial finding of probable cause is the asylum state, prior to extradition. See *Kirkland, supra* 385 F.2d at 676; *Ierardi v. Gunter, supra* 931.

E. The asylum state has no obligation to extradite upon the basis of a conclusory statement that a judge has found probable cause if the documents accompanying the requisition do not contain sufficient data to support an independent finding of probable cause.

The Michigan Attorney General, apparently as an alternative to his query whether the asylum state has a right to require any probable cause showing prior to rendition,

argues that the Arizona arrest warrant's bald statement that the magistrate had "found reasonable cause to believe that such offense(s) were committed and the accused committed them", (A 64) supplies the requisite finding. The Attorney General also cites *Ierardi v. Gunter, supra,* for the proposition that the asylum state should be permitted to rely on the "presumption of regularity of the demanding state's probable cause determination." (Brief for the Petitioner, pp. 22-23).

To permit such reliance, particularly in the case at bar, would totally subvert the salutory effects of the *Kirkland* doctrine.

Appellee concedes that a few cases have read *Ierardi* to permit acceptance by the asylum state of a demanding state's judicial warrant finding probable cause, even if the warrant or other papers do not state facts establishing probable cause. *In Re Consalvi,* 370 N.E. 2d 707, 708-709 (Mass. App., 1977); *Smith v. Helgemoe,* 367 A.2d 218 (N.H., 1977); *In Re Puopolo,* 362 N.E. 2d 1198 (Mass., 1977). This interpretation is based on the following passage from *Ierardi*:

> "If, for example, the papers submitted by Florida were to show that a judicial officer or tribunal there had found probable cause, Massachusetts would not need to find probable cause anew, nor would it need to review the adequacy of the Florida determination. Instead, it would be entitled to rely on the official representations of its sister state that the requisite determination had been made; thus in our view Massachusetts may credit an arrest warrant shown to have issued upon a finding of probable cause in Florida just as it would credit a Florida indictment." *Ierardi v. Gunter,* supra 931.

Ierardi's language does not support the claim that a barren assertion that probable cause has been found, without supporting facts, will suffice to justify extradition.

The key is what is meant by "an arrest warrant *shown* to have issued upon a finding of probable cause. . ." *Ierardi*, 931, (Emphasis supplied). *Ierardi* must be read consistently with the constitutional authorities which it cites, particularly *Gerstein v. Pugh, supra* and the requirement of "the neutral and detached judgment of a judicial officer or tribunal" (*Ierardi*, 931). Thus, an arrest warrant "shown" to have issued on probable cause can only mean a warrant accompanied by sufficient independent facts to assure that the magistrate's judgment was indeed "neutral and detached" and not merely a rubber stamp for police suspicion. *Aguilar v. Texas, supra; United States v. Ventresca, supra*, 380 U.S. 102 at 109.

The asylum jurisdiction has a duty "to make certain that the requirements of the Uniform Criminal Extradition Act have been satisfied before the accused is surrendered to the demanding state" *Commonwealth v. Carlos*, 341 A.2d 71, 73 (PA. S. Ct., 1975). To discharge this obligation, an asylum state has a right to require that the demanding state's warrant[3] be accompanied by a complaint or affidavit reflecting on its face sufficient facts to satisfy the asylum governor, or habeas corpus court, that there is an independent basis for the magistate's finding of probable cause. *Application of Evans*, 512 S.W. 2d 238, 240, 242 (Mo. App., 1974); 35 CJS Extradition §14(7) p. 422; *Pippin v. Leach, supra*, 534 P.2d 1196; *Kirkland v. Preston, supra*, 385 F.2d 670, 677.

[3]At least one court has concluded that a complaint or affidavit from the demanding state stating facts upon which an independent determination of probable cause can be based is the key prerequisite to rendition and that a warrant is mere surplusage. See *State ex rel Sieloff v. Golz*, 80 Wis. 2d 225; 258 N.W. 2d 700 (1977); *Grant v. Shobe*, 18 Or. App. 188; 524 P.2d 550 (1974).

In the case at bar, the arrest warrant tendered by Arizona states, in form language

> "I have found reasonable cause to believe that such offense(s) were committed. . ."

under which, in the appropriate blank, a justice of the peace has affixed her signature.

The Attorney General does not take issue with the Michigan Supreme Court's finding that the Arizona documents did not reflect probable cause, but instead concedes that this is a question upon which reasonable minds may differ. (See Petition for Writ of Certiorari, p. 6). Consequently, Appellee will not belabor the point here by detailing the content, or lack thereof, of the charging documents accompanying the Arizona requisition. Suffice it to say that the warrant and the complaint are framed in the conclusory charging language of the applicable Arizona Penal Code sections (ARS 13.672(A); 13.1645; 13.661-663; 13.671(A); ARS 13.682; 13.688) for embezzlement and/or larceny of an automobile, with the date, vehicle description and the name of the owner of the vehicle filled in (A 24-26). The complaint, sworn out by a police officer, Richard Bishop, is expressly made upon information and belief, and fails to detail any underlying facts supporting Bishop's belief that Mr. Doran took a vehicle from Wayne Kahler, or identify sources of the allegation of theft. The additional "supporting" affidavit, (which postdates the warrant by about a month) was sworn out by another police officer, Thomas Bradley, who states therein that he had contacted unnamed "persons having knowledge of said offense," had prepared written reports and statements, and had received reports from other police officers and that all this information had been compiled in a report consisting of

nine pages (A 27-28). The nine page report was not attached, and there was nothing in the Bradley declaration to indicate why (or if) he believed his unnamed informants to be credible or their information reliable. Moreover, there was no inkling of what that information was. (Another affidavit by Bradley, identifying a photograph of Mr. Doran as the person charged, sheds no additional light on the facts behind the charge (A 29).

Such documents, like the affidavit in *Kirkland, supra,* 385 F.2d 672, and the complaint in *Giordenello, supra,* 375 U.S. 486-487 are factually insufficient to support a finding of probable cause. They are framed exclusively inconclusions and bald allegations of criminal conduct without underlying details. The warrant, complaint and Bradley declaration are sheer boilerplate[4]; much as the Attorney General abhors the term, Appellee employs it only to show that the Arizona charging documents are skeletal and nonspecific and fail to demonstrate, on their face, any support for the magistrate's putative determination of "reasonable cause." The Michigan Supreme Court was not obligated to assume the regularity of this standardized conclusion of reasonable cause where the accompanying papers do not reflect any information which could have formed the basis for a neutral and independent assessment of probable cause.

Appellant notes that the Arizona rules of criminal procedure place a duty on the magistrate to ascertain probable cause prior to signing an arrest warrant. Arizona

[4]The printed version found in the Appendix does not really do justice to the formlike nature of the charging documents and Appellee would refer this Court to the actual photostatic reproductions in the Record. Additionally, the complaint and warrant are word for word replicas of Form I and Form II(a), Arizona Rules of Criminal Procedure.

procedure permits, but does not require, the magistrate to consider information extrinsic to the complaint in finding probable cause. ARS Rules of Criminal Procedure, Rule 2.4. Appellant asks this Court to in effect presume from the procedure that the magistrate considered additional information even though nothing in the record indicates that she did so. The clear import of Rule 2.4 is that the magistrate may base his finding on the complaint alone. *State v. Lynch,* 107 Ariz. 463; 489 P.2d 697 (1971), cited by Appellant for the proposition that Arizona law places a duty on the magistrate to consider additional facts before issuing a warrant, seems to be a case where the defendant was arrested on less than probable cause, and later received a preliminary hearing on probable cause.

Assuming arguendo that additional investigation by the magistrate can be presumed, the record in this case belies any indication that there were additional details to support the allegations in the complaint. The original complaint and warrant specified that the date of the offense was December 18, 1975, a date on which it was undisputed that Mr. Doran was in Bay City, Michigan. (Record, August 13, 1976 Habeas Corpus Hearing Transcript, pp. 28-30, A 85-87). Subsequently, Arizona supplied the Bay County Prosecutor with an "amended" complaint and warrant: xeroxed copies of the originals with the December 18 date of offense crossed out and "December 3" written in. The complaint and warrant also charged Mr. Doran alternatively with embezzlement or theft of an automobile. The variance in dates as well as the mutually exclusive theories upon which Appellee was charged raise a strong inference that available details concerning the allegation of larceny were scarce. Appellant's assertion that Arizona was not "notified of the

hearings in the Michigan courts and was not given the opportunity to present any evidence at a habeas corpus hearing" is simply not true. The Bay County Prosecutor had contacted Maricopa County authorities before the August 13, 1976 habeas corpus hearing and requested "additional affidavits". (August 13, 1976 Habeas Corpus Hearing Transcript, p. 27). The additional affidavits were never forthcoming, although this case was not submitted to the Michigan Supreme Court until June 9, 1977.

Although some courts have conditioned rendition upon an actual evidentiary determination of probable cause in the asylum jurisdiction,[3] the Michigan Supreme Court has imposed a much less drastic prerequisite: charging documents facially reflecting sufficient underlying facts to support a magistrate's independent determination that probable cause exists to charge the accused fugitive with crime. Since Arizona did not comply with this minimal requirement, the Michigan Supreme Court was correct in refusing to extradite a Michigan inhabitant "in aid of an enterprise the key details of which remain in the dark." *Kirkland*, 385 F.2d 677.

[3]See *Tucker v. Commonwealth of Virginia*, 308 A.2d 783 (D.C. App., 1973); *People ex rel Porzio v. Wright*, 59 Misc. 2d 1056; 301 N.Y.S. 2d 668 (1969).

II.

A REQUIREMENT THAT A SHOWING OF PROBABLE CAUSE PRECEDE RENDITION IS IN HARMONY WITH THE EXTRADITION CLAUSE AND FEDERAL LEGISLATION ON EXTRADITION.

The Michigan Attorney General maintains that the *Doran* decision, as well as the holding of *Kirkland v. Preston* focus on the interests of the accused fugitive while disregarding the purpose of the Extradition Clause and the interests of the several states in speedy extradition. This is a misreading of both decisions, which actually seek to reconcile the Fourth Amendment safeguard against significant restraint without probable cause with the aim of the Extradition Clause to promote expeditious rendition of fugitives.

Interstate extradition is primarily governed by federal law, the source of which is Article IV, §2 cl. 2 of the United States Constitution. Supplanting the preexisting custom of exchanging fugitives solely on the basis of comity, Art. IV, §2 cl. 2 placed a duty on each state executive to return, on demand, a person "charged" in a sister state. *Innes v. Tobin*, 240 U.S. 127; 36 S. Ct. 290; 60 L.Ed. 562 (1916). 62 Stat. 822 (1948); 18 U.S.C. 3182, the implementing federal statute, provides for the return of a fugitive upon production by the demanding state of "a copy of an indictment found or an affidavit made before a magistrate . . . *charging* the person demanded" with crime.

Appellant cites many decisions of this Court construing the above provisions. These decisions appear to be primarily concerned with the permissible scope of a habeas

corpus inquiry, in the asylum state, into the sufficiency of a demand for extradition. From these decisions, a number of recurrent principles can be gleaned.

1. A state may enact ancillary legislation in aid of, but not in conflict with federal legislation on extradition. *Innes v. Tobin, supra.*

2. Extradition is a summary process which has as its aim the elimination of state boundaries to prevent guilty fugitives from finding permanent asylum in another state. *Appleyard v. Massachusetts*, 203 U.S. 222, 228; 27 S. Ct. 122; 51 L.Ed. 161 (1906); *Roberts v. Reilly*, 116 U.S. 80, 6 S. Ct. 291; 29 L.Ed. 544 (1885); *Sweeny v. Woodall*, 344 U.S. 86, 89; 73 S. Ct. 139; 97 L.Ed. 114 (1952); *Biddinger v. Commissioner of Police*, 245 U.S. 128, 132-133; 38 S. Ct. 41; 62 L.Ed. 193 (1917).

3. A habeas corpus inquiry into the sufficiency of the "charge" upon which extradition is sought is limited to whether the documents submitted in support of the rendition demand "substantially charge" the accused fugitive with crime. *Pierce v. Creecy*, 210 U.S. 387, 405; 28 S. Ct. 714; 52 L.Ed. 1113 (1908); *Appleyard v. Massachusetts, supra* 203 U.S. at 228.

4. The substantiality of the charge is a question of law which must be determined upon the face of the charging documents. *Appleyard v. Massachusetts, supra*, 203 U.S. 228. *Roberts v. Reilly, supra*, 116 U.S. 80, 95. The sufficiency of such documents as a matter of technical pleading is not to be questioned upon habeas corpus. Only their sufficiency as a charge of crime may be probed. *Pierce v. Creecy, supra*, 210 U.S. 387, 409.

5. A habeas corpus inquiry in the asylum state may not extend to the merits of the charge against the accused fugitive (i.e. the question of his guilt or innocence) for to go

beyond the face of the papers supporting the demand would violate the interests of comity and unduly burden the extradition process. *In the Matter of Strauss*, 197 U.S. 324; 25 S. Ct. 535; 49 L.Ed. 774 (1905).

Contrary to Appellant's intimation, Appellee submits that the *Doran* decision is in harmony with all the above principles.

A. The Michigan Supreme Court in *Doran* limited its habeas corpus review of the Arizona charging documents to the question of whether those documents, on their face, "substantially charged" the accused fugitive with crime.

Federal legislation on extradition excludes state action only in matters for which the Federal statute expressly or by necessary implication provided. Section 3182 does not expressly define, or limit, definition of its "affidavit . . . charging" requirement. In *In Matter of Strauss, supra*, 197 U.S. at 331, this Court afforded a liberal interpretation to the term "charged",

> "[D]oubtless the word 'charged' was used in its broad significant to cover any proceeding which a state might see fit to adopt by which a formal accusation was made against an alleged criminal. In the strictest sense of the term a party is charged with crime when an affidavit is filed, alleging the commission of the offense, and a warrant is issued for his arrest, and this is true whether a final trial may or may not be had upon such charge."

The Uniform Criminal Extradition Act, Section 3, enacted by Michigan, MCLA 780.3; MSA 28.1285(3), and Arizona, ARS 13-1303, did not depart from this broad

concept of a charge in its requirement that the "indictment, information or affidavit" tendered by the demanding state "must substantially charge the person demanded with . . . crime".

The holding of the Michigan Supreme Court did not conflict with this liberal definition of a charge when it construed the Section 3 "substantially charge" requirement to mean that extradition charging documents must reflect probable cause. *Doran, supra*, 401 Mich. at 245. Several other courts have also equated a "substantial charge" with a charge supported by probable cause. *Martinez v. Sheriff of Clark County, supra*, 527 P.2d 1200, 1201; *Sheriff of Clark County v. Thompson, supra*, 452 P.2d 911, 914-915; *Brode v. Power*, 31 Conn. Sup. 412; 332 A.2d 376 (1974); *Kirkland v. Preston, supra*, 385 F.2d 676.

Thus, the Michigan Supreme Court, sitting as a reviewing court in a habeas corpus proceeding challenging extradition, did not exceed any of the traditional strictures on extradition habeas corpus. The Supreme Court confined its scrutiny of the Arizona charging documents to the face of those documents. The Court expressly declined to inquire into the merits of the charge or into the question of guilt or innocence. *Doran, supra*, 401 Mich. 250. Further, the Michigan Court carefully limited its inquiry to the question of whether the Arizona documents substantially charged a crime by demonstrating probable cause. *Doran, supra*, 401 Mich. 245.

Further, the Michigan Court's scrutiny of the Arizona documents can hardly be characterized as "hyper-technical." It has never been suggested that the question of probable cause for charging a crime is a matter of technical pleading. See *Martinez v. Sheriff of Clark County, supra,*

527 P.2d 1201; *Sheriff of Clark County v. Thompson, supra,* 452 P.2d 911, 914-915. Rather, this Court has traditionally characterized the question of probable cause as distinct from guilt or innocence, and as a subject of commonsense, rather than hypertechnical, inquiry. See *United States v. Ventresca,* 380 U.S. 102, 109; 85 S. Ct. 741; 13 L.Ed.2d 684 (1965). Thus, the Michigan Supreme Court made no attempt to expand the traditional scope of extradition habeas corpus. See Note, *Extradition Habeas Corpus,* 74 Yale L.J. 78 (1964); *State v. Ritter,* 74 Wis.2d 227; 246 N.W. 2d 552, 554-555 (1976).

B. A requirement that charging documents in support of a requisition reflect probable cause does not burden the process of extradition.

An extradition habeas corpus proceeding has, as its purpose, the accommodation of contrasting, but not necessarily conflicting interests: the interests of comity in transactions between sister states, and of efficiency in the rendition of fugitives, counterbalanced against the right of the individual to be free from unjustified significant restraints and the asylum state's right to protect its inhabitants from such intrusions. *State v. Ritter, supra*, 246 N.W. 556-557. Appellant seems to assume that since the Michigan Supreme Court in *Doran* relied heavily on Fourth Amendment protection of individual rights, the federal interests of comity and speedy extradition were ignored.

This conclusion does not necessarily follow from the *Doran* result. As noted by Judge Spaeth, dissenting in *Commonwealth ex rel Marshall v. Gedney,* 237 Pa. Super. 372; 352 A.2d 528, 534 (1975).

"For a statutory provision to be constitutional, it must conform to all parts of the Constitution. To say that it implements one clause – here, the extradition clause – is not enough if in carrying out that implementation it directly conflicts with another part of the Constitution. Therefore, for the federal and state extradition statutes to be constitutional, they must conform not only to the requirements of the extradition clause, but also to the requirements of the fourth and fourteenth amendments, which is to say, as regards this case, that 'no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing. . . the persons. . . to be seized. U.S. Const. Amend. IV."

In *Bailey v. Cox*, 296 N.E. 2d 422 (Ind., 1973), the Supreme Court of Indiana took the position that to inquire into whether there is probable cause for the initiation of criminal proceedings in the demanding state would thwart the intent of the Extradition Clause.

The dissent of Justice DeBruler eloquently refuted this notion:

"Finally, I would say that there is no conflict between the requirements of Art. IV, §2, cl. 2, of the United States Constitution, and the requirements of the Fourth Amendment. Neither impinges upon the other. They are in harmony. A person is not charged by affidavit under Art. IV, §2, cl. 2 until an arrest warrant is issued. *Kirkland v. Preston, supra.* The Fourth Amendment governs the issuance of an arrest warrant. So construed they serve to supplement one another." *Bailey v. Cox*, 296 N.E. 2d 422, 428 (1973).

To require extradition charging documents to conform to the Fourth Amendment does not encumber the extradition process by "strapping on unnecessary formalities." *Wellington v. State of South Dakota*, 413 F. Supp. 151, 154 (S.D., 1976).

The *Doran* decision does not undermine the doctrine of comity by second guessing the regularity of judicial processes in a sister state. Rather, the *Doran* Court confined its Fourth Amendment scrutiny to the *face* of the demanding state's charging documents. Nor does the *Doran* result obstruct the summary nature of extradition. If the demanding state does have probable cause data, it is no real inconvenience to record this evidence in the extradition papers:

". . . documenting probable cause on the face of an affidavit requires no more than what policemen do on a daily basis to secure arrest or search warrants." *Wellington v. State of South Dakota, supra,* 154.

See also Note, *Interstate Rendition and the Fourth Amendment,* 24 Rutgers L. Rev. 551 (1970).

Governors, or habeas corpus judges, will hardly be significantly burdened by having to study written submissions for probable cause in extradition cases. *Kirkland v. Preston, supra,* 385 F.2d 670, 677; *Ierardi v. Gunter, supra,* 528 F.2d 929, 931. The resulting imposition on interstate law enforcement is negligible compared with the very serious consequences of a wrongful extradition.

Thus, the Michigan Supreme Court's action in refusing to extradite a presumptively innocent defendant on the basis of a requisition not visibly supported by a magistrate's neutral determination of probable cause strikes a harmonious balance between the demands of the Fourth Amendment and the Extradition Clause. Such equilibrium is the aim of a system of ordered liberty.

CONCLUSION

For the foregoing reasons, Appellee respectfully requests that this Honorable Court affirm the judgment of the Michigan Supreme Court.

Respectfully submitted,

STATE APPELLATE
DEFENDER OFFICE

KATHLEEN M. CUMMINS
Assistant Defender
Third Floor, North Tower
1200 6th Avenue
Detroit, Michigan 48226
256-2814

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1977
No. 77-1202

STATE OF MICHIGAN

Petitioner-Appellant,

-vs-

HAROLD W. DORAN

Respondent-Appellee.

ON WRIT OF CERTIORARI TO THE

SUPREME COURT OF MICHIGAN

MEMORANDUM SUGGESTING MOOTNESS

STATE APPELLATE DEFENDER OFFICE

KATHLEEN M. CUMMINS
Assistant Defender
Attorney for Respondent

Third Floor, North Tower
1200 Sixth Avenue
Detroit, MI 48226
(313)256-2814)

Dated: September 8, 1978

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-1202

STATE OF MICHIGAN

Petitioner-Appellant,

-vs-

HAROLD W. DORAN,

Respondent-Appellee,

ON WRIT OF CERTIORARI TO THE

SUPREME COURT OF MICHIGAN

MEMORANDUM SUGGESTING MOOTNESS

1. On April 17, 1978, Certiorari was granted in the above case. On April 18, 1978, counsel for Respondent Harold Doran attempted to contact Mr. Doran at his last known residence, namely his father's home in Bay City, Michigan.[1] Counsel spoke with Mr. Doran's father William Doran, who informed her that Mr. Doran left his home approximately three days after his release from the Bay County Jail and had not returned. William Doran added that he had no present knowledge of his son's whereabouts.

In the months that followed, counsel for Respondent mounted a diligent search in an attempt to determine if Mr. Doran was still in the state of Michigan. The services of an investigator were employed. Mr. Doran's known associates in the Bay City area were

[1] Upon his release October 4, 1977, by the Michigan Supreme Court, Mr. Doran informed counsel that he would be residing at the home of William Doran - 710 S. Arbor, Bay City, Michigan.

contacted and all professed no knowledge of Mr. Doran's current whereabouts. A check with the Law Enforcement Information Network, as of August 18, 1978, revealed no current entries in any state concerning Mr. Doran beyond his initial arrest in this matter December 18, 1975 (See Affidavit, Appendix A). On September 6, 1978, this attorney again contacted Mr. Doran's father. He again informed her that he had neither seen nor heard from Respondent since her last contact (See Affidavit, Appendix B).

Although the search for Mr. Doran continues, counsel for Respondent believes the repeated failure of her efforts to locate her client demonstrates that there is presently a strong possibility that he is no longer in the State of Michigan. The suggestion of mootness stemming from Mr.Doran's absence prompts his counsel to file this Memorandum.

2. The apparent disappearance of Respondent Harold Doran compells this Court to consider whether this case has any continuing vaibility as an actual "case or controversy".

This case has been briefed on the merits and scheduled for oral argument October 4, 1978. Counsel for Respondent has, until now, refrained from raising the issue of mootness because she felt constrained to make every reasonable effort to locate her client before basing any jurisdictional attacks upon his apparent disappearance. The continued futility of these efforts has convinced counsel of the likelihood that Mr. Doran is no longer present in Michigan. Thus, despite the stage to which this case has advanced[2], counsel for Respondent urges that Mr. Doran's apparent absence requires that this Court consider the question of mootness prior to adjudicating the

[2] This Court has not hesitated to address the question of mootness at any stage of a proceeding; even where both parties failed to raise the issue. DeFunis v Odegaard, 416 US 312, 94 S Ct 1704, 40 L Ed 2d 164 (1974); North Carolina v Rice, 404 US 244, 92 S Ct 402, 30 L Ed 2d 413 (1971); Rice v Sioux City Memorial Park, 349 US 70, 78,75 S Ct 614, 99 L Ed 897 n2 (1955); Weinstein v Bradford, 423 US 147, 96 S Ct 347, 46 L Ed 2d 350 (1975).

merits of this case.

3. This Court has often recognized that federal courts are powerless to decide questions which cannot affect the rights of the litigants in the case before them. North Carolina v Rice, 404 US 244, 246, 92 S Ct 402, 30 L Ed 2d 413-415 (1971).

The exercise of this Court's judicial power under Article III of the United States Constitution depends on the existence of a case or controversy.

To be cognizable by this Court, a case "must be definite and concrete, touching the legal relations of parties having adverse legal interests....It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." Aetna Life Insurance Co v Haworth, 300 US 227, 240-241, 57 S Ct 461, 81 L Ed 617 (1937); North Carolina v Rice, supra, 404 US at 246; Preiser v Newkirk, 422 US 395, 401, 95 S Ct 2330,45 L Ed 2d 272 (1975).

Mootness is a jurisdictional question because this Court is not impowered to decide moot questions or abstract propositions. North Carolina v Rice, supra, 246. The rule in federal cases is that an actual controversy must exist at all stages of review and that even in cases originating in state courts, a determination of mootness is fatal to the exercise of this Court's jurisdiction. DeFunis v Odegaard, 416 US 312, 316, 94 S Ct 1704, 40 L Ed 2d 164 (1974); Preiser v Newkirk, 422 US 395, 401,95 S Ct 2330, 45 L Ed 2d 272 (1975). In order to determine whether a "live" controversy exists here, this Court must consider what the adverse interests of the parties are and what, if any, practical impact a decision on the merits of this case will have on those interests. See Socialist Labor Party v Gilligan, 406 US 583, 92 S Ct 1716, 32 L Ed 2d 317 (1972); Powell v McCormack, 395 US 486, 496, 89 S Ct 1944, 23 L Ed 2d 491, 502 (1969).

This is an extradition habeas corpus case. Mr. Doran challenged the legality of his arrest under the Michigan Governor's warrant

by exercising his statutory[3] right to file a habeas corpus action in a local court of record. The habeas corpus proceeding attacked the validity of the Governor's warrant upon which Mr. Doran was being held on the grounds that the warrant was issued in response to a requisition which was not visibly supported by a showing of probable cause. The Bay County Circuit Court denied the petition for habeas corpus. In reversing the Circuit Court, the Michigan Supreme Court in effect concluded that the Governor's warrant was invalid for the reason claimed, and released Mr. Doran.[4] Mr. Doran's interest in this case was, obviously, to avoid the effects of a wrongful extradition.

Beyond seeking a clarification from this Court of the constitutional issues surrounding extradition, the Petitioner's brief does not specify his immediate interest in the outcome of this case. Presumably, however, his ultimate aim in pursuing this appeal is reversal of the Michigan Supreme Court, vindication of the Governor's warrant and renewed power to extradite Harold Doran.

The present posture of this case is such that its adjudication by this Court, on the merits, will have no significant impact on the concrete interests of the parties. Extradition jurisdiction extends only to persons "found in" the asylum state. U.S. Constitution, Art IV § 2 cl.2; MCLA 780.2, MSA 28.1285(2) (Uniform Criminal Extradition Act.). Mr. Doran's apparent disappearance raises a strong inference that he is no longer in Michigan. If the Petitioner should prevail in this Court and consequently regain the power to extradite Mr. Doran, there will in all likelihood, be no subject matter upon which this power may be exercised. In this event, the Doran case would no

---

[3] MCLA 780.9; MSA 28.1285(9)

[4] Outright release of the prisoner is an unusual remedy in extradition habeas corpus appeals. The more common procedure is to afford the demanding state a few days in which to correct its defective documents. The immediate release of Mr. Doran was prompted by the Michigan Court's recognition that he had spent almost two years in the Bay County jail, being held solely for extradition upon an untried charge. People v Doran, 401 Mich 235, 250 fn 5, 258 NW2d 406 (1977). See also Pippin v Leach, 543 P2d 1191 (Colo, 1975); Kirkland v Preston, 385 F2d 670, 676 (DC App, 1967).

longer be "definite and concrete, touching the legal relations of parties having adverse legal interests" and "admitting of specific relief through a decree of a conclusive character.".

This case is analogous to appeals from convictions in which the defendant has escaped. In Smith v United States, 94 US 97, 24 L Ed 32 (1876), the accused escaped from custody after sueing out a writ of error from this Court to the highest state court. This Court noted that if it affirmed the conviction, the escapee was not likely to reappear, and if it reversed and ordered a new trial, he would "appear or not, as he might consider most for his interest. Under such circumstances, this Court said, "we are not inclined to hear what may prove to be only a moot case." Smith, supra, 94 US 97.

See also Eisler v United States, 338 US 189, 69 S Ct 1453, 93 L Ed 1897 (1949). In this case, Mr. Doran is not an escapee but a free individual who obtained relief from his lengthy detention under the Governor's warrant. Unlike an escapee, Mr. Doran could not be forcibly returned to Michigan if discovered elsewhere. His freedom renders his return far more unlikely than the reappearance of an escaped convict. An affirmance by this Court would merely continue the status quo and provide no further impetus than already exists for his return. A reversal would again subject Mr. Doran to extradition proceedings in Michigan, thus further decreasing his incentive to return.

4. Nor can Mr. Doran's absence be characterized as a "voluntary cessation of allegedly illegal conduct" which "does not deprive the tribunal of power to hear and determine the case, i.e. does not make the case moot." DeFunis v Odegaard, 416 US 312, 94 S Ct 1704, 40 L Ed 2d 164 (1974). Mr. Doran is now legally free to leave Michigan. Even if this Court were to decide this case against him, he would not then or ever be under any legal compulsion to return to the State of Michigan.

5. This case also fails to come within the "capable of repetition, yet evading review" exception to the doctrine of mootness. Sosna v Iowa, 419 US 393, 95 S Ct 553, 42 L Ed 2d 532 (1975); Weinstein v Bradford, 423 US 147, 96 S Ct 347, 46 L Ed 2d 359 (1975). There is no concrete indication that Mr. Doran is either present in Michigan or might return in future, particularly if reappearance means reincurring the risk of extradition. Thus, the likelihood of Mr. Doran's emergence in Michigan is too speculative to render the facts from which this appeal arose reasonably capable of repetition. Weinstein v Bradford, supra 423 US 148. Although similar extradition disputes may confront Petitioner in future, it is clear that in order to invoke the "capable of repetition" doctrine, the recurring dispute must be between the present parties. Weinstein v Bradford, supra, 423 US 147, 148; Roe v Wade, 410 US 113, 93 S Ct 705, 35 L Ed 2d 147 (1973); Nebraska Press Association v Stuart, 427 US 539 96 S Ct 2791, 49 L Ed 2d 683 (1976). The possibility that Petitioner and Mr. Doran will once again become embroiled in an extradition dispute is simply too remote to supply a basis for this Court's decision of the substantive issues.

The apparent and continued absence of a Respondent whose concrete interests can be affected by an order of this Court presents "insuperable obstacles" to the exercise of this Court's jurisdiction. Rescue Army v Municipal Court, 331 US 549, 574, 67 S Ct 1409, 91 L Ed 1666 (1947). This Court should decline to hear this case rather than risk what may well prove to be a moot adjudication of the merits.

FOR THE FOREGOING REASONS, Respondent respectfully requests that this Honorable Court dismiss the Writ of Certiorari as improvidently granted.

Respectfully submitted,

STATE APPELLATE DEFENDER OFFICE

BY: Kathleen M. Cummins

KATHLEEN M. CUMMINS
Assistant Defender
Attorney for Respondent

Third Floor, North Tower
1200 Sixth Avenue
Detroit, MI 48226
(313)256-2814

Dated: September 8, 1978

A P P E N D I X A

AFFIDAVIT

STATE OF MICHIGAN (
) ss
COUNTY OF WAYNE (

LINDA BORUS, being first duly sworn, deposes and states:

1. She is an Investigator employed by the STATE APPELLATE DEFENDER OFFICE.

2. In May of 1978, she was assigned to investigate the whereabouts of Harold Doran, Respondent herein.

3. Since then, she has taken the following actions in an attempt to locate Mr. Doran:

a. sent a letter to his last known address, namely c/o William Doran, 710 So. Arbor, Bay City, Michigan;

b. Checked the visitor lists at the Bay County jail for the period of Mr. Doran's incarceration and contacted people who had visited Mr. Doran;

c. Contacted all hospitals in the Bay City area, inquiring if Mr. Doran was listed as a patient;

d. Contacted the Michigan Department of Health regarding the possible demise of Mr. Doran;

e. Contacted the Bay County Sheriff's Department to ascertain if they or their contacts had any current information concerning Mr. Doran;

f. Checked with the Law Enforcement Information Network for entries in any state concerning Mr. Doran more recent than his initial arrest on this matter December 18, 1975.

4. None of the above efforts produced any information regarding Harold Doran's current whereabouts.

Further, deponent sayeth not.

Linda Borus
LINDA BORUS

Subscribed and sworn to before
me this 8th day of September, 1978.

Elva J Kelley
Notary Public, Wayne County, Michigan
My Commission Expires: July 30, 1980

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-1202

STATE OF MICHIGAN,

Petitioner-Appellant,

v

HAROLD W. DORAN,

Respondent-Appellee.

ON WRIT OF CERTIORARI TO THE

SUPREME COURT OF MICHIGAN

MEMORANDUM OPPOSING SUGGESTION OF MOOTNESS

FRANK J. KELLEY
Attorney General

Robert A. Derengoski
Solicitor General

Jann Ryan Baugh
Assistant Attorney General

761 Law Building
525 West Ottawa Street
Lansing, Michigan 48913
(517) 373-1124

Dated: September 18, 1978

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-1202

STATE OF MICHIGAN,

Petitioner-Appellant,

v

HAROLD W. DORAN,

Respondent-Appellee.

ON WRIT OF CERTIORARI TO THE

SUPREME COURT OF MICHIGAN

MEMORANDUM OPPOSING SUGGESTION OF MOOTNESS

On December 18, 1975, Harold W. Doran was arrested in Bay City, Michigan, and charged with receiving and concealing stolen property under the laws of the State of Michigan, MCLA 750.535; MSA 28.803. The Michigan authorities immediately notified local authorities in Maricopa County, Arizona, and Arizona authorities issued a warrant for Doran's arrest charging him with the theft of a motor vehicle or, in the alternative, theft by embezzlement pursuant to Arizona law. Eventually the Michigan criminal charge was dismissed, and Doran was continued in custody while Arizona attempted to extradite him. On February 11, 1976, the Governor of Arizona issued a requisition for extradition which was accompanied by the original criminal complaint and warrant plus two supporting affidavits. On March 12, 1976, the Michigan Governor issued a Governor's warrant.

Doran petitioned in the Michigan courts for a writ of habeas corpus, and on October 4, 1977, the Michigan Supreme Court issued its opinion and final process which reversed the judgment of the Michigan Court of Appeals and the Circuit Court for the County of Bay and ordered Doran released from custody forthwith.

The Attorney General of the State of Michigan filed a petition for writ of certiorari which was docketed on February 27, 1978. On April 17, 1978, the petition for writ of certiorari was granted. Briefs have been filed and this matter is scheduled for oral argument on October 4, 1978.

Counsel for Doran has filed a memorandum suggesting mootness and two affidavits detailing efforts of counsel and her investigator to ascertain the present location of Doran. The affidavits indicate that contact has been made with his father, his visitors during incarceration, local hospitals, the Michigan Department of Health, the county sheriff's department and the Law Enforcement Information Network with no information being ascertained which would indicate where Doran is currently living. Counsel for Doran speaks of a strong possibility, a likelihood, and an inference that he has left the state.

Counsel makes the point that under Article III of the Constitution, in order to exercise its judicial power, this Court must find that a case or controversy exists and that the Court can only decide questions which affect the rights of the particular litigants in the case at bar. North Carolina v Rice, 404 US 244, 246; 92 S Ct 402; 30 L Ed 2d 413-415 (1971). Counsel argues that the case must be definite and concrete and that there must be a substantial controversy as distinguished from a hypothetical state of facts citing Aetna Life Insurance Co v Hayworth, 300 US 227-240, 241; 57 S Ct 461; 81 L Ed 617 (1937); North Carolina v Rice, supra, 404 US at 246; Preiser v Newkirk, 422 US 395, 401; 95 S Ct 2330; 45 L Ed 2d 272 (1975).

Doran's counsel asserts that the present posture of this litigation is such that a determination of the merits by this Court

would have no significant impact on the "concrete interests of the parties" because if the State of Michigan should prevail and regain the power to extradite Doran, "there will in all likelihood, be no subject matter upon which this power may be exercised." Counsel alleges that Doran is not now under any legal compulsion to return to the state of Michigan if he has left and that this case does not fall within the "capable of repetition, yet evading review" branch of the doctrine of mootness. Southern Pacific Terminal Co v ICC, 219 US 498; 31 S Ct 279; 55 L Ed 310 (1911). Counsel further asserts that although the state of Michigan may be confronted in the future with similar factual situations, the recurring dispute would probably not be between the state of Michigan and Doran, citing Weinstein v Bradford, 423 US 147; 96 S Ct 347; 46 L Ed 2d 359 (1975); Roe v Wade, 410 US 113; 93 S Ct 705; 35 L Ed 2d 145 (1973); Nebraska Press Association v Stuart, 427 US 539; 93 S Ct 2791; 49 L Ed 2d 683 (1976).

Counsel's argument rests solely upon the fact that Doran has not had any need to contact her and has not informed her of his location. Counsel for Doran cannot affirmatively demonstrate either where he is or where he is not and therefore she is only providing information from which she wishes the inference to be drawn that Doran is no longer in Michigan. However, as a practical matter, it is to Doran's advantage to remain in Michigan not risking extradition until this Court has ruled on the merits of the challenge to the Michigan Supreme Court opinion.

The investigator's affidavit alleges that a letter was sent to Doran at his last known address in care of his father, but the affidavit is strangely silent as to whether the letter was returned undelivered by the postal authorities. It is also curious that the affidavit does not indicate that counsel contacted either the office of the Bay County Prosecutor or William Caprathe, the public defender who initially represented Doran in Bay County.

It should also be noted that in state circuit court Doran, through his counsel William J. Caprathe of the Bay County Public Defender's Office, attempted to obtain release on bond and also filed a motion for bond on appeal. In the Motion for Bond on Appeal filed in the Michigan Supreme Court on April 11, 1977, counsel made the following assertions:

> "There is no doubt that Mr. Doran, if released on bond, would appear when required in response to the order of the court. Mr. Doran is a man of fifty-three, is a native of Bay City and has close ties to the community, in particular his father, William Doran, who resides at 710 S. Arbor in Bay City. Mr. Doran's father, who lives alone is elderly and requires Mr. Doran's care."

While counsel asserts that Doran is not living with his father, there is no indication that if his father were in need of his assistance Doran would not appear or that Doran has permanently severed all communication with his father.

The memorandum asserts that even if the People of the State of Michigan prevail and regain the power to extradite Doran he will not be found, and therefore, the People will have a hollow power which they cannot exercise. However, if this Court were to sustain the position of the People, Harold Doran would be a fugitive and at that point all of the law enforcement officials in Michigan would be able to search for him to secure his arrest and detention. Such a search would undoubtedly be more thorough than that undertaken by counsel and her investigator. At this time because the Michigan Supreme Court has released Doran and has stated that he is not a fugitive, the People are powerless to order Michigan law enforcement officials to detain him. Therefore, the People have not invested time and money in a futile gesture.

The memorandum admits that similar extradition disputes may confront Michigan in the future. It is obvious from the opinion of the Michigan Supreme Court that the rule in Michigan, if allowed to stand, is much more stringent than it was before and is more

stringent than that in many of the other States. For that reason it is probable rather than possible that similar disputes will occur in the future. It is also probable that the Michigan courts will follow the opinion of the Michigan Supreme Court and will release those individuals who are being held in situations similar to that of Harold Doran. In that case the State of Michigan will never have a situation any different than the situation now confronting this Court. Following the opinion of the Michigan Supreme Court if an individual is being detained on the basis of documents which are found to be insufficient and the person is released as was Doran, the People of the State of Michigan, following the logic of Doran's counsel, would never be able to have this Court review the decision of the Michigan Supreme Court.

The memorandum also does not address the fact that Michigan's Governor signed a warrant which would have been executed but for the opinion of the Michigan Supreme Court and which will be executed if the position of the People is upheld by this Court. The memorandum also does not affirmatively state that the State of Arizona has obtained custody of Doran from any other state or that the State of Arizona for whatever reason no longer wishes to obtain custody of Doran. That in fact is not the case.

The District Attorney in Phoenix, Arizona, has been advised by the Solicitor General of Michigan of the filing of briefs in this case and the scheduled date of oral argument. The last communication with Arizona indicated that the authorities there did not have custody of Doran and were desirous of prosecuting him.

It is the position of the People of the State of Michigan that as long as a Michigan Governor's warrant has been issued which would be executed in the event the People were to prevail, and the State of Arizona does not yet have custody of Harold Doran, the case is not rendered moot.

In the case at bar the situation is no different than it was on the day in which the petition for writ of certiorari was filed. When Harold Doran was released by the Michigan Supreme Court, he was free to go wherever he chose. The People of the State of Michigan have never at any time in the petition or in their brief made any assertions regarding Doran's location. Also at the time that Doran's counsel moved to proceed in this Court in forma pauperis, she asserted in her motion that she had not had any contact with Doran. Therefore, this matter is factually in no different posture than it was when it was initially filed in this Court.

In Roe v Wade, 410 US 113; 93 S Ct 705; 35 L Ed 2d 147 (1973), this Court was confronted with the situation in which those pregnant women who brought the suit were obviously no longer subject to the pregnancies which initiated the lawsuit in 1970. In denying a mootness challenge the Court considered the fact that the normal human gestation period is so short that a pregnancy would come to term before the usual appellate process could be completed, and that therefore, if the termination of pregnancy mooted the case, pregnancy litigation would seldom, if ever, survive beyond the trial stage and appellate review would be effectively denied. In reaching the conclusion that the law should not be that rigid the Court found a classic justification for a conclusion of non-mootness and a situation which could be "capable of repetition, yet evading review."

Although not a requirement for the survival of man, crime and extradition will probably always be with us, and as long as the Michigan Supreme Court provides for release of individuals like Doran, appellate review of Michigan extradition litigation will be effectively denied if the logic of Doran's counsel is followed.

In Southern Pacific Terminal Co v ICC, 219 US 498, 31 S Ct 279; 55 L Ed 310 (1911), this Court originally enunciated the

"capable of repetition yet evading review" standard of the law of mootness. In that case it was held that because of the short two-year duration of a challenged ICC order, it was virtually impossible to litigate the validity of the order before it had expired. The Court allowed review even though the order in question had expired by its own terms and indicated that the matter was probable of repetition and it was also probable that the same party would be subject to a same or similar order in the future.

> "In the case at bar the order of the Commission may to some extent (the exact extent it is necessary to define) be the basis of further proceedings. But there is a broader consideration. The questions involved in the orders of the Interstate Commerce Commission are usually continuing (as are manifestly those in the case at bar) and their consideration ought not to be, as they might be, defeated, by short term orders, capable of repetition, yet evading review, and at one time the Government and at another time the carriers have their rights determined by the Commission without a change of redress." 219 US 515.

In Sosna v Iowa, 419 US 393; 95 S Ct 553; 42 L Ed 2d 532 (1975), an attack was made against the durational residency requirement to obtain a divorce in Iowa. The suit was certified as a class action so that the named plaintiff might represent the class of residents who had resided within Iowa for less than a year and who desired to initiate actions for dissolution of marriage or legal separation. A three-judge court by a divided vote upheld the constitutionality of the Iowa statute. When the case reached this Court, the Court felt obliged to address the question of mootness before reaching the merits of the appellant's claim. By the time the case reached this Court, the plaintiff had long since satisfied the Iowa residency requirement and, it, therefore, no longer stood as a barrier to her attempts to secure dissolution of her marriage in the Iowa courts. The named plaintiff had, in fact, obtained a divorce in New York. The Court stated that if

the appellant had sued only on her own behalf, the fact that she now satisfied the residency requirement and had obtained a divorce elsewhere would make the matter moot and would require dismissal. However, because the matter had been certified as a class action, the Court found that factor significantly affected the mootness determination.

In Sosna, the Court indicated that it was not willing "to speculate that she may move from Iowa, only to return and later seek a divorce within 1 year from her return. . . ." The Court went on to state:

> "But even though appellees in this proceeding might not again enforce the Iowa durational residency requirement against appellant, it is clear that they will enforce it against those persons in the class that appellant sought to represent and that the district court certified. In this sense the case before us is one in which state officials will undoubtedly continue to enforce the challenged statute and yet, because of the passage time, no single challenger will remain subject to its restrictions for the period necessary to see such a lawsuit to its conclusion." 419 US 400.

In Sosna, the Court would have had to speculate as to Sosna that she would leave Iowa, move back again to Iowa, marry again, and seek a divorce from someone within one year of her return to Iowa. The case at bar hardly requires as much speculation as Sosna.

In Weinstein et al v Bradford, 423 US 147; 96 S Ct 347; 46 L Ed 2d 350 (1975), a prisoner sued the members of the North Carolina Board of Parole in federal district court claiming that they were obligated under the Fourteenth Amendment of the Constitution to afford him certain procedural rights in considering his eligibility for parole. Although Bradford sought certification as a class action, the district court refused to certify the case and dismissed the complaint. On appeal to the Court of Appeals for the Fourth Circuit, the prisoner's claim was sustained.

After the petition for certiorari was granted and the case was set for oral argument, Bradford filed a suggestion of mootness. The judgment of the Court of Appeals was vacated and the case was remanded to the district court with instructions to dismiss the complaint. In reaching this result, this Court considered the fact that Bradford had been temporarily paroled and subsequently completely released from supervision. The Court found that it was clear that Bradford had absolutely no interest in the procedures which were subsequently followed by the Parole Board in granting parole to other individuals. The Court also found that Bradford, who had initially challenged the parole board procedures, "no longer has any present interest affected by that policy." 423 US 148. The Court was unwilling to find that there was a demonstrated probability that Bradford would again be among those individuals who by virtue of future conviction and incarceration would come within the jurisdiction of the parole board.

In DeFunis v Odegaard, 416 US 312; 94 S Ct 1704; 40 L Ed 2d 164 (1974), Marco DeFunis, Jr., unsuccessfully applied for admission to law school and asserted that the school's admission policy resulted in the constitutional denial of his application. The trial court agreed and granted the requested relief. DeFunis entered law school, and by the time the case reached this Court and was argued, DeFunis was registered for his last term of law school. The law school indicated that DeFunis would be allowed to complete the term, and it was obvious that he would receive a diploma. In dismissing the case as moot, the Court stated that all of the parties had indicated that the status of DeFunis would not be affected by anything that the Court might express on the merits of the controversy. In finding that DeFunis did not present a question "capable of repetition, yet evading review", the Court determined that DeFunis would never again run the gauntlet of the law school admission process and so that as to him the question

was certainly not capable of repetition. He had completed a once in a lifetime experience.

In Socialist Labor Party v Gilligan, 406 US 583; 92 S Ct 1716; 32 L Ed 2d 317 (1972), an appeal seeking to invalidate various Ohio laws restricting minority party access to the ballots was dismissed. During the pendency of the appeal the Ohio legislature revised the election code which mooted the issues on appeal to all but one of the issues decided below. The one remaining issue, a challenge to a loyalty oath, was factually not well-developed. In dismissing the case the Court recognized that even if jurisdiction exists it should not be rendered unless the case "tenders the underlying constitutional issues in clean-cut and concrete form." 406 US 588. Unlike the Socialist Labor Party the record in this case is factually very well developed and the constitutional issue could not be clearer.

Doran's counsel indicates that his case is analagous to appeals from convictions in which the defendant has escaped. However, such an analogy is clearly inappropriate. An escape by one who is appealing his conviction or his sentence is clearly a voluntary relinquishment of a right possessed by the individual. Harold Doran should certainly not have the ability to relinquish the state's right to review of an erroneous decision.

In Smith v United States, 94 US 97; 24 L Ed 32 (1876), the Court denied a motion to set the case for oral argument indicating that it was clearly within its discretion to refuse to hear a criminal case unless the convicted party who was suing out the writ was where he could be made to respond to any judgment rendered.

Of similar import is Eisler v United States, 338 US 189; 69 S Ct 1453; 93 L Ed 1897 (1949), in which the petitioner fled from the country after his petition for writ of certiorari was

granted and after his cause was submitted on the merits. The court again stressed the fact that the petitioner by his own volition may have rendered moot any judgment on the merits which he had sought.

In Nebraska Press Association v Stuart, 427 US 539; 96 S Ct 2791; 49 L Ed 2d 683 (1976), this court determined that an order accommodating the defendant's right to a fair trial and the petitioner newspaper's interests in reporting pretrial events was not moot even though in the interim the criminal defendant was convicted of murder, sentenced to death, and his appeal was pending in the State Supreme Court. At the time of argument there were no restrictions on what might be spoken or might be written about the criminal case. In evoking the "capable of repetition, yet evading review" doctrine of Southern Pacific Terminal Co v ICC, supra, the Court indicated that the controversy between the parties was capable of repetition. If the criminal defendant's conviction were reversed and a new trial were ordered, the trial court might enter another restrictive order, and secondly, the state supreme court's decision authorized state prosecutors to seek restrictive orders in other appropriate cases. Therefore, the court found that the dispute between the state and the media was capable of repetition and that if the issue were not addressed, the dispute would evade the review or at least considered plenary review since the orders by their nature were so short-lived.

In Rescue Army v Municipal Court, 331 US 549; 67 S Ct 1409; 91 L Ed 1666 (1947), while concluding that jurisdiction existed, the Court found compelling reasons existed for not excrcising it. The suit was an appeal from a judgment of the Supreme Court of the State of California which denied a writ of prohibition against a pending prosecution for violation of municipal ordinances governing the solicitation of contributions for charity. The appeal was dismissed without prejudice to the future determination

of the constitutional validity of the ordinances. In refusing to exercise jurisdiction, the Court indicated that a policy of accelerated decision might do great harm to the security of private rights without attaining any benefits of tolerance and harmony for the functioning of various authorities in our scheme of government. The issues which were presented were in highly abstract form. The individual petitioner was not presenting a criminal trial for review, and the court was not even presented with a text of the charges against him. The state procedure in prohibition was compared by the Court to a declaratory judgment procedure, and it was stated that in effect the suit sought a judicial declaration that jurisdiction did not exist in the municipal court. The court stated that for a variety of reasons the shape in which the underlying constitutional issues reached the court presented obstacles to the exercise of jurisdiction. Those reasons were not only prematurity and comparative abstractness due to the nature of the prohibition proceedings but also the fact that a volume of legislative provisions were involved which were intertwined and which were complicated by the California Supreme Court's disposition of them and this Court's own determinations in the companion case.

The foregoing discussion of the cases cited by counsel for Doran demonstrates that those cases are distinguishable and not determinative of this matter.

Consideration of a federal habeas corpus case involving a serviceman who was released from the military by use of the writ may be helpful. In Eagles v United States ex rel Samuels, 329 US 304; 67 S Ct 313; 91 L Ed 308 (1946), an individual claimed exemption from military service because he was a theological student. However, he was classified I-A and inducted into the Army. He filed a petition for writ of habeas corpus seeking release from military custody, and the district court ordered the writ of habeas

dismissed. On appeal the Circuit Court of Appeals reversed and remanded the cause to the district court and directed that court to discharge Samuels from military custody without prejudice to further proceedings under the Selective Service Act. After remand, the district court ordered the release of Samuels, and he was unconditionally released from military service. Certiorari was granted and Samuels contended in this Court that the case was moot because he was no longer in the custody of the military or of anyone else and that he was therefore free to go wherever he chose. This Court indicated that if the writ of habeas corpus had been denied in the lower courts, and pending the disposition of the appeal, Samuels had obtained a discharge from the Army, the case would be moot.

In determining the question of mootness, it was stated that habeas corpus is a means of making a judicial inquiry into the cause of restraint of liberty and that if the restraint of liberty is terminated without the use of the writ, the case is finished. However, if custody of an individual is ended through the use of the writ, the situation is different.

> "Our rules recognize the beneficient function of the writ . . . by providing that a prisoner to whom the writ has been granted may, pending appeal, be enlarged on a recognizant. Rule 45. The fact that he has been so enlarged does not render the appeal of the custodian moot. . . . In such a case the release is obtained through the assertion of judicial power. It is the propriety of the exercise of that power which is in issue in the appellate court, whether the prisoner is discharged or remanded to custody. Though the writ has been granted and the prisoner released, the appellate court by what it does is not rendering an opinion and issuing an order which cannot affect the litigants in the case before it. . . . Affirmance makes the prisoners release final and unconditional. Reversal undoes what the habeas corpus court did and makes lawful a resumption of the custody. . . ." (citations omitted) 329 US 307-308.

Although Samuels attempted to obtain his release pursuant to the federal habeas corpus statute, the case is certainly analogous to the one at bar and reversal of the Michigan Supreme Court would

make lawful a resumption of the custody of Doran. See also, Eagles v United States, ex rel Horowitz, 329 US 317, 67 S Ct 320, 91 L Ed 318 (1946).

The Michigan statutes provide that the Governor may recall his warrant of arrest or may issue another warrant whenever he deems proper. MSA 28.1285(20); MCLA 780.20. In the case at bar, the Governor has not recalled his warrant and has not issued another. The initial warrant which he issued remains outstanding and would have been executed but for the opinion of the Michigan Supreme Court which in effect granted the writ of habeas corpus. However, the Michigan Supreme Court could not order the Governor to withdraw his warrant. The judiciary is not authorized to interfere with the determination of a coordinate branch of the government. Germaine v Governor, 176 Mich 585 (1913).

At this time, Doran's attorney, based on a less than exhaustive search for a client who at this time has no need to contact his attorney, asserts that there is no case in controversy. However, nothing could be further from the actual state of facts. There is an individual who was released, the People contend erroneously, and who remains at large while a valid Governor's warrant exists commanding the arrest of that individual. While that individual has felt no need to contact his attorney, that does not mean that he either is not now or will not in the future be within the jurisdiction where that warrant could be executed. As long as the State of Arizona does not have custody of Harold Doran and the Michigan Governor's warrant remains outstanding, this controversy is not moot.

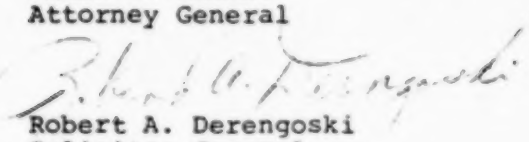
CONCLUSION

For the foregoing reasons, this Court is respectfully

urged to deny the relief requested in the Memorandum Suggesting Mootness.

Respectfully submitted,

FRANK J. KELLEY
Attorney General



Robert A. Derengoski
Solicitor General

Jann Ryan Baugh
Assistant Attorney General

761 Law Building
525 West Ottawa Street
Lansing, Michigan 48913
(517) 373-1124

Dated: September 18, 1978